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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, AS ADMINISTRATRIX OF THE ESTATE OF MARVIN PAUL GOETT, DECEASED, PETITIONER,

vs.

UNION CARBIDE CORPORATION AND AMHERST BARGE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1958

CERTIORARI GRANTED MARCH 2, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

Civil No. 1755

Plaintiff Demands a Jury Trial

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff,

—against—

CARBIDE & CARBON CHEMICALS CORPORATION and UNION CARBIDE & CARBON CORPORATION, Defendants.

COMPLAINT—Filed February 7, 1956

Plaintiff, complaining of the defendants, by her attorneys, states and alleges upon information and belief, as follows:

FOR A FIRST CAUSE OF ACTION:

First: That prior to the commencement of this action Ellen Goett was duly appointed Administratrix of the Estate of Marvin Paul Goett, deceased.

Second: That at all the times hereinafter mentioned, the defendant Carbide & Carbon Chemicals Corporation was a foreign corporation, duly licensed to do business in the State of West Virginia and having its office and principal place of business in the City of Charleston, West Virginia.

Third: That at all the times hereinafter mentioned, the defendant Union Carbide & Carbon Corporation, was a foreign corporation, duly licensed to do business in the State of West Virginia and having its office and principal place of business in the City of Charleston, West Virginia.

Fourth: That at all the times hereinafter mentioned, the plaintiff was and still is a citizen and resident of the State of West Virginia, within the jurisdiction of this Honorable Court.

Fifth: That the jurisdiction of this case arises and is [fol. 5] conferred upon this Court by reason of diversity of citizenship and amount. That the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Sixth: That at all the times hereinafter mentioned, the defendant Carbide & Carbon Chemicals Corporation owned, operated, managed and controlled a certain barge or vessel known as "204".

Seventh: That at all the times hereinafter mentioned, the defendant Union Carbide & Carbon Corporation, owned, operated, managed and controlled a certain barge or vessel known as "204".

Eighth: That the defendant Carbide & Carbon Chemicals Corporation was under a duty to keep and maintain the aforesaid vessel and its appurtenances in a safe and seaworthy condition.

Ninth: That the defendant Union Carbide & Carbon Corporation was under a duty to keep and maintain the aforesaid vessel and its appurtenances in a safe and seaworthy condition.

Tenth: That at all the times hereinafter mentioned, the decedent Marvin Paul Goett was employed aboard the aforementioned vessel in the capacity of a harbor worker as a sand blaster and for the purposes of this action, a seaman.

Eleventh: That at all the times hereinafter mentioned, the decedent Marvin Paul Goett was employed aboard the aforementioned vessel in the capacity of a harbor worker as a sand blaster and for the purposes of this action, a seaman.

[fol. 6] Twelfth: That on or about the 5th day of October, 1955, the deceased was lawfully aboard the aforesaid vessel, being employed thereon as aforesaid, and while so lawfully aboard the said vessel, the deceased Marvin Paul Goett was caused to fall and sustain severe personal injuries, he suffered conscious pain, mental anguish, physical suffering and subsequent death.

Thirteenth: That the aforesaid accident and injuries sustained thereby were due to the carelessness, recklessness and negligence of the defendants and each of them, their agents, servants and employees; the fault, neglect and omission of the officers and seamen aboard the aforesaid vessel; the failure, neglect and omission of the defendants and each of them to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition and reasonable state of repair, and the defendants' failure to take any means of precautions for the safety of the decedent, Marvin Paul Goett; in failing to provide the decedent with a reasonably safe place wherein to work, and in causing, allowing and permitting the vessel to be in an unseaworthy, unsafe and otherwise dangerous condition by failure to provide life preservers, live lines, safety nets and proper, adequate and sufficient safety men and other tools and equipment and other means of rescue to safeguard the health and well-being of the decedent, so that the decedent was caused to fall and suffer the injuries complained of and subsequent death, and the defendants and each of them were otherwise careless, reckless and negligent in the premises as aforesaid.

Fourteenth: That the aforesaid accident and the injuries sustained were due solely to the carelessness, recklessness and negligence of the defendants and each of them, their agents, servants and employees and without any contributory negligence on the part of the decedent.

[fol. 7] Fifteenth: That by reason of all of the foregoing, the said Marvin Paul Goett died on the 5th day of October, 1955.

Sixteenth: That the decedent died leaving him surviving heirs at law and next of kin who were dependent upon him for their support and maintenance and upon whose behalf this action is being brought.

Seventeenth: That by reason of the foregoing, the heirs at law and next of kin of the decedent Marvin Paul Goett have been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION:

Eighteenth: Plaintiff repeats and realleges all of the allegations contained in paragraphs "First" to "Fourteenth" inclusive, with the same force and effect as if set forth herein at length, and in addition thereto alleges:

Nineteenth: That as a result of the foregoing, the said Marvin Paul Goett sustained severe injuries to his head, body and limbs, nerves and nervous system, and had been caused to suffer severe physical pain and mental anguish as a result thereof, all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendants herein in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the first cause of action, and in the sum of Fifty Thousand ($50,000.00) Dollars on the second cause of action, together with the costs and disbursements of this action.

Pauley & Andrews, By E. Franklin Pauley, Attorneys for Plaintiff, Office and P. O. Address, Peoples Building, Charleston, West Virginia.

S. Eldridge Sampliner, Esq., Of Counsel.

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of
Marvin Paul Goett, deceased, Plaintiff,

—against—

UNION CARBIDE & CARBON CORPORATION,
a corporation, Defendant.

THIRD PARTY COMPLAINT—Filed April 2, 1956

1. Plaintiff, Ellen Goett, as Administratrix of the Estate of Marvin Paul Goett, deceased, has filed against defendant, Union Carbide & Carbon Corporation, a corporation, complaint a copy of which is hereto attached as Exhibit C.

2. Defendant avers and charges that it is entitled to recover from the third party defendant all or part of what plaintiff may recover from this defendant by reason of the fact that the barge known as CC-204 at the time of the accident complained of in Exhibit C was in the exclusive care, custody, possession and control of said Amherst Barge Company for purposes of repair and that the said decedent, Marvin Paul Goett, was an employee of said Amherst Barge Company working on said barge in said possession of said Amherst Barge Company under a contract for repair with this defendant.

Inasmuch as said barge CC-204 was in the exclusive possession, care, custody and control of said Amherst Barge Company at the time of said accident, the primary liability for any loss, damages or claims therefor would, as a matter of law, be imposed upon said third party defendant because in absence of express contract a vessel owner is entitled to indemnity for amount recovered by con-

tractor's employee, if negligence of contractor, having exclusive custody of vessel, is the sole, active or primary cause of accident in which contractor's employee is injured. [fol. 11] But in addition to said liability imposed as a matter of law defendant avers and charges that in its contract for repairs of said barge with said third party defendant appears the following clause:

> "INSURANCE: If this agreement provides for work to be performed by Seller (Amherst Barge Company) on property owned or controlled by Buyer (Union Carbide and Carbon Corporation), or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liabili y and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be given to Buyer at least five (5) days prior to the effective date of such cancellation."

And defendant further charges and alleges that both as a matter of law and by said express contract the said third party defendant would be liable to it for all loss or damage which might have been incurred or occasioned

by its care, custody and repair while said barge was in its exclusive custody, care and control.

Wherefore, defendant, Union Carbide & Carbon Corporation, demands judgment against said third party defendant, Amherst Barge Company, a corporation, for all sums that may be adjudged against said defendant and in favor of the plaintiff, as well as its costs about its defense in this behalf expended.

Charles M. Love, Attorney for Defendant, Security Building, Charleston, West Virginia.

[fol. 12]

EXHIBIT "C"—COMPLAINT

Omitted. Printed side page 4 supra.

[fol. 16] — [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant and Third-Party Plaintiff,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

ANSWER OF AMHERST BARGE COMPANY TO THIRD-PARTY COMPLAINT FILED BY UNION CARBIDE & CARBON CORPORATION AGAINST AMHERST BARGE COMPANY, A CORPORATION—Filed April 20, 1956

1. This third-party defendant admits the allegations contained in Paragraph 1 of the third-party complaint.

2. This third-party defendant admits the following allegations contained in Paragraph 2 of the third-party complaint:

A. That said barge was owned by Union Carbide & Carbon Corporation and pursuant to a contract between said Union Carbide and the third-party de- [fol. 17] fendant, the latter was doing certain work on the barge at the time of Goett's death and said decedent was an employee of this third-party defendant and working on said barge at the time of his death.

B. That while so employed Goett came to his death from drowning in the Kanawha River.

3. This third-party defendant denies all other allegations in said Paragraph 2 of said complaint, including the allegation that the third-party defendant had exclusive control of said barge at the time of Goett's death.

4. This third-party defendant avers that it complied with the provisions of the laws of the United States popularly known as the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code, Title 33, Sections 901-950), and subscribed to the compensation provided for therein; and that the dependents of the said Marvin Paul Goett are entitled to the compensation benefits described in said Act and so provided for by this third-party defendant.

5. This third-party defendant denies that it was in any manner negligent and avers that if the decedent died as the result of negligence, that such negligence resulted from the acts of said decedent or of the third-party plaintiff or of both.

6. This third-party defendant denies any duty or obligation to indemnify Union Carbide & Carbon Corporation against said accident or against any claims, suits, costs, judgments or other losses arising therefrom.

Wherefore, this third-party defendant denies all liability and responsibility for said accident; alleges that it was [fol. 18] free of all negligence; avers that it is completely

protected by subscribing to the aforesaid compensation act; and asks to be dismissed.

Jackson, Kelly, Holt & O'Farrell, W. T. O'Farrell, Attorneys for Amherst Barge Company, Address: 1601 Kanawha Valley Building, Charleston, West Virginia.

[fol. 18a] Certificate of Service (omitted in printing).

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER OF DEFENDANT, UNION CARBIDE AND CARBON CORPORATION, A CORPORATION, TO THE COMPLAINT FILED HEREIN AGAINST IT—Filed September 17, 1956

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

A cause of action for injuries does not survive the death of the injured party, as alleged in the second cause of action, where no action has been instituted during the life of the injured party.

[fol. 20] Third Defense

"No suit to recover damages for the death of a human being, caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law."

Fourth Defense

The provisions of the Jones Act, 46 U.S.C.A. 688, are not available to this plaintiff, as the person whose injuries resulted in death must be a seaman and a member

of the crew; in other words, the act only lies in favor of an employee against his employer, and plaintiff's decedent was not employed by this defendant but by Amherst Barge Company, the third party defendant. 46 U.S.C.A. at page 256.

Fifth Defense

"At the common law no civil action lies for an injury resulting from death."

Sixth Defense

"The maritime law, as generally accepted by maritime nations, leaves the matter untouched."

Seventh Defense

The action cannot be predicated upon the Death on High Seas Act, 46 U.S.C.A. 765 et seq., especially Section 767 thereof, which specifically provides that the act does not apply to "any waters within the territorial limits of any state."

Eighth Defense

If the action is maintainable, which is denied, it is maintainable by virtue of West Virginia Code 55-7-5 (Serial Section 5474) and 55-7-6 (Serial Section 5475). [fol. 21] If this action is maintainable under the West Virginia wrongful death statute, Code 55-7-5,6, no actionable negligence is alleged, which is necessary to support such an action, and the allegation of unseaworthiness will not support the charge of negligence.

Ninth Defense

If the action be predicated upon said provisions of West Virginia Code 55-7-5,6, plaintiff cannot recover because of the contributory and primary negligence of which her intestate was guilty, contributing to, or causing his own death.

Tenth Defense

If the action can be predicated upon said West Virginia wrongful death statute, West Virginia Code 55-7-6,5,

such act carries its own limitation of ten thousand dollars, or at the most twenty thousand dollars, and plaintiff's complaint for any amount in excess thereof should be dismissed before trial, if trial be necessary. "The liability and the remedy are created by the same statutes and the limitations of the remedy are therefore to be treated as limitations of the right."

Eleventh Defense

This action should be dismissed as an improper attempted joinder of alleged causes with respect to the claim for suffering and the wrongful death claim. Such claims are different in nature and in ownership.

Twelfth Defense

Defendant admits the allegations of Paragraphs First, Third, Fourth and Fifth of the complaint filed herein and says that the allegations contained in Paragraphs Second, Sixth and Eighth are now immaterial by reason of the order entered herein on February 23, 1956, dismissing [fol. 22] Carbide & Carbon Chemicals Corporation as a party defendant.

Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair.

Defendant denies the allegations of Paragraph Ninth of the complaint, and for want of information and knowledge denies the allegations of Paragraphs Tenth, Eleventh and Twelfth.

Defendant denies that any injury sustained by the deceased, Marvin Paul Goett, as alleged in Paragraph Thirteenth or otherwise, was due to the carelessness, recklessness or negligence of it, or its agents, servants or employees; and denies that there were any officers or

seamen aboard the vessel at the time complained of; and denies that said vessel was in an unseaworthy condition and denies that it was under any duty to keep the same in a seaworthy condition or in a reasonable state of repair with respect to plaintiff's decedent; and denies that it was under any duty to provide said decedent with a safe place to work, and denies that it was under any duty to provide any equipment with reference to said vessel at the times referred to in said complaint, and denies that decedent was caused to fall, or that he did fall, and further denies all allegations with respect to the alleged death of said decedent for want of knowledge and information, and ayers that said barge CC-204 was in shipyard for repair at the time of the death of decedent in the exclusive custody and control of Amherst Barge Company, as appears from the third party complaint filed herein.

[fol. 23] Defendant denies all the allegations of Paragraph Fourteenth, and for want of information and knowledge denies the allegations of Paragraphs Fifteenth, Sixteenth and Seventeenth of said complaint, and further says that the allegations of Paragraph Seventeenth are fatally insufficient in any event under the provisions of West Virginia Code 55-7-5,6.

Defendant further denies all of the allegations contained in Paragraphs Eighteenth and Nineteenth, and all other allegations contained in either the first or second cause of action not hereinbefore specifically admitted.

Wherefore, this defendant denies all liability and responsibility for said accident and alleges that it was free from all negligence and that recovery, if any, to which plaintiff may be entitled is against said third party defendant; and asks to be dismissed with its reasonable costs about its defense in this behalf expended.

Dayton, Campbell & Love, Charles M. Love, Attorneys for Union Carbide and Carbon Corporation, Address: 1100 Security Building, Charleston, West Virginia.

Certificate of Service (omitted in printing).

[fol. 24]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWERS OF UNION CARBIDE & CARBON CORPORATION TO INTERROGATORIES PROPOUNDED TO IT BY PLAINTIFF—Filed May 6, 1957

Question 1. State the place where, the builder and the date that the CC 204 was constructed.

Answer. Neville Island, Pennsylvania, by Dravo Corporation, in February, 1948.

Question 2. State the cost for the construction of the vessel.

Answer. $48,187.40.

Question 3. State whether there was additional equipment and gear on the vessel at the date of the accident complained of herein other than the equipment on the vessel [fol. 25] as originally constructed and, if so, state the additional equipment and its cost and cost of installation aboard the vessel.

Answer. None aboard.

Question 4. State whether any major repairs have been made to the vessel since its original construction and, if so, state the nature of the repairs and the costs thereof.

Answer. Barge CC-204 was damaged July 21, 1951, in collision with Steamship "Velma Lykes" in the Houston Ship Channel. Extensive repairs were made in Texas. Except for such repairs, the cost of which is not readily available, but will be furnished if required, the barge has had normal maintenance with no unusual additions.

Question 5. State the type of power under which the vessel navigated.

Answer. It is a nonself-propelled barge, pushed or pulled by a tow boat.

Question 6. State the dates for the five years previous to the date of the accident complained of herein when the vessel was under the same or similar repair as on said date of accident:

Answer. June, 1952. September, 1950.

Question 7. State the names of the repair companies who performed the work as discussed in the previous interrogatory.

Answer. Marietta Manufacturing Company, Point Pleasant, West Virginia, on both occasions.

Question 8. State the method of delivery of the vessel to the repair company or companies including the Amherst Barge Co., where the vessel was delivered on each occasion and whether the vessel was delivered afloat or in drydock to the respective repair companies.

[fol. 26] Answer. Delivered afloat via towboat.

Question 9. State whether any employee or agent of the Union Carbide & Carbon Corporation was present on or about the vessel in order to inspect the vessel during the period of repair as above stated and, if so, state the name or names of said employee or agent for the five years prior to the date of accident complained of herein and the nature of the duties of said person.

Answer. Fred C. Pritchard, Route 2, Box 211, St. Albans, West Virginia. Title, "Maintenance Engineer for Barges." Duties, Supervisor of Barge Maintenance under Works Engineering Department, and in conjunction with Traffic Department of defendant. During the period of repair at Amherst Mr. Pritchard was not at Amherst Docks until after death of Mr. Goett. On October 7, 1955, Mr. Pritchard inspected the vessel on marine ways and ordered additional minor repairs, not related to the sandblasting being performed by Mr. Goett on October 5, 1955.

Question 10. State whether the vessel carried as part of ship's gear lifeboats, life ropes, life preservers, safeguards, safety ropes, life jackets, life buoys or row boats at any time from the date of construction to the date of accident complained of herein and, if so, state the ship's gear

carried, model of said gear, the dates carried and the location of said equipment aboard the vessel.

Answer. None.

Question 11. If the answer to the above interrogatory is in the affirmative, state the date of purchase of said gear, the costs thereof, the model number of said gear, and the company or companies from whom purchased.

Answer. None.

[fol. 27] Question 12. State the number of employees who manned the vessel during its periods of carriage of cargo and the capacity of each crewman aboard the vessel.

Answer. is an unmanned barge during carriage.

Question 13. State the employees of Union Carbide & Carbon Corporation who were stationed aboard the tow, when a tow was employed to navigate the vessel, and the capacity of each crewman.

Answer. None.

Question 14. State the name and capacity of the official of Union Carbide & Carbon Corporation who was in charge of the operation, management and control of the CC 204 and other vessels owned by Union Carbide & Carbon Corporation and who authorized the purchase of ship's gear for said vessels.

Answer. Mr. R. E. Martin, Traffic Manager. None purchased.

Question 15. State whether said official authorized the p[illegible]chase of the following equipment and, if so, the dates of each authorization and the date of purchase, delivery and installation aboard the CC 204:

(a) life boats
(b) life rafts
(c) life preservers
(d) safety nets
(e) safety ropes
(f) life jackets
(g) life buoys
(h) row boat

Answer. None purchased for installation aboard CC 204.

[fol. 28] Question 16. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was laid up at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 17. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was dismantled at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 18. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was out of commission at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said [fol. 29] complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by

this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 19. State the dates of United States Coast Guard or American Bureau of Shipping inspections of the vessel for the five years preceding the accident complained of herein.

Answer. The barge was inspected annually. The last certificate of inspection prior to the accident was issued April 6, 1955, by United States Coast Guard covering inspection completed April 1, 1955, and photostatic copy of the same is attached hereto showing permission for navigation of unmanned tank barge on rivers, inland waters tributary to the Gulf of Mexico, approved without equipment other than fire extinguishers for period ending April 1, 1956. Amended certificate issued by Coast Guard on October 26, 1955, after dry docking at Reed, West Virginia, is also attached.

Question 20. State the nature and extent of each inspection as discussed in the above interrogatory and the results thereof.

Answer. The nature and extent of such inspection is shown in answer to question 19, including copy of certificate covering inspection attached in answer to said question 19.

Question 21. State whether the repairs to the vessel, to (sic) the contract between the Union Carbide & Carbon Corporation and the Amherst Barge Company were to be performed in drydock or when the vessel was afloat or both for various operations in the repair work.

[fol. 30] Answer. A large portion of the work of painting the entire surface, including bottom and sides, would necessarily require performance in drydock, but details of performance were at the discretion and judgment of third party defendant, which had exclusive control of barge during the performance of the contract, subject only to the specifications thereof.

Question 22. State whether Union Carbide & Carbon Corporation made any inspection of the repair work on the vessel between the date of delivery and the date of the accident complained of herein and, if so, state the name and capacity of the official who so inspected the vessel.

Answer. None.

Question 23. This question was withdrawn by plaintiff.

Question 24. State whether, during the time of minor repairs to the CC 204, there were any employees of Union Carbide & Carbon Corporation aboard the vessel for the purpose of

(1) management
(2) operation
(3) safety
(4) performance of the contract,

during the operation of minor repair to the vessel and, if so, state his name and capacity.

Answer. No employee of Union Carbide & Carbon Corporation was aboard the barge during the time of minor repairs for either (1) management, (2) operation, or (3) safety. Mr. Pritchard was aboard the barge on October 7, and November 5, 1955, and perhaps at other times between said dates, to inspect repairs and alterations, other than [fol. 31] painting. In addition, Mr. J. L. Barker, Jr., Coatings Engineer of the Works Engineering Department of defendant, Mr. C. E. Holley of defendant's Research Department, and Mr. P. N. Zahniser of the Traffic Department, were at Amherst docks, Reed, West Virginia, on October 7, 1955, for the purpose of inspecting the condition of a special painting that had been applied approximately three years previously. Also, Mr. Barker, his technical assistant, Mr. A. L. Gray, and Mr. A. R. Giles were at Amherst docks, Reed, West Virginia, inspecting the painting covered by this contract between October 7, 1955, by which time the barge was on the marine ways and out of the water, and November 7, 1955, when the barge was again launched.

R. E. Martin

Duly sworn to by R. E. Martin, jurat omitted in printing.

[fol. 32]

ATTACHMENT TO ANSWERS

TREASURY DEPARTMENT
U. S. COAST GUARD
CG-841 (Rev 9-48)

FILE NO. YB 1913

This Certificate Expires 1 April , 1949

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL CC-804 OFFICIAL NO. Not documented
CLASS Tank Barge TONS: GROSS 886 NET 665 LENGTH 196'
HOME PORT South Charleston, West Virginia OWNERS Carbide & Carbon Chemicals Company
OPERATORS Carbide & Carbon Chemicals Company, Div. of Union Carbide & Carbon Corp.&c, Charleston, W.Va.

The inspection of the above-named vessel having been completed at South Charleston, West Virginia on the 1st day of April, 1948, I hereby CERTIFY that the said vessel was built at [illegible] in the State of Pennsylvania, in the year 1942, rebuilt in the year [illegible]; that the hull is constructed of steel; is provided with [illegible] staterooms, [illegible] berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder; and is allowed to carry [illegible] passengers, [illegible] persons in addition to the crew.

The following complement of licensed officers and crew is required to be carried, included in which there must be [illegible] certificated lifeboatmen: UNMANNED

Master	Second Mate	Able Seamen	Chief Engineer	Firemen/Watertenders
1st Class Pilot	Third Mate	Ordinary Seamen	1st Assistant Engineer	Oilers
2d Class Pilot	Inland Mate	Watchmen	2d Assistant Engineer	Motormen Operators
Chief Mate	Radio Officer	Deckhands	3d Assistant Engineer	

and also may carry [illegible] persons when needed in the steward's and other departments not connected with the navigation of the vessel. Total number of persons allowed [illegible].

OFFICERS OR

The said vessel is permitted to be navigated for one year on RIVERS; INLAND WATERWAYS; PINTWATER TO THE GULF OF MEXICO.

DATA, PARTICULARS OF EQUIPMENT AND PERIODIC EXAMINATIONS

Number lifeboats for [illegible] persons	Fire extinguishers, Class A [illegible]	Sounding letter issued [illegible]	BOILERS
Metal lifeboats for [illegible] persons	X Fire extinguishers, Class B II	Date drydocked 29 May 1946	Number Year built
Motor lifeboats for [illegible] persons	Fire extinguishers, Class C [illegible]	Propelled by [illegible]	Kind
Working boats for [illegible] persons	Fire extinguishers, Semiportable [illegible]	Tail shaft drawn [illegible]	Minimum efficiency of weakest longitudinal [illegible]
Liferafts for [illegible] persons	Class [illegible]	[illegible]	Record in Office of [illegible]
Emergency apparatus for [illegible] persons	Fire extinguishers, Fixed [illegible]	Pressure vessels examined [illegible]	Hydrostatic tested [illegible]
Life preservers, adult's [illegible]	[illegible]	[illegible]	[illegible]
Life preservers, children's [illegible]	Fire axes [illegible] Fire pumps [illegible]	[illegible]	Soundings required [illegible]
Wood floats [illegible]	Fire hose, total length [illegible] ft.	Pipe [illegible]	[illegible]
Oyst. line-throwing apparatus [illegible]	Approved and approved for the carriage of [illegible] or combustible liquids of grade "A" [illegible] or 22/1906	[illegible]	Date hydrostatic pressure applied [illegible]
[illegible]	882 FWP) and 1999F 27/946	[illegible]	Maximum steam pressure allowed [illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Capacity in barrels 5,430	[illegible]	[illegible]

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA } ss:

/s/
I, R. E. [illegible], CGM, USCG, 386-0
(Officer in Charge, Marine Inspection)

Subscribed and sworn to before me this 8th day of April, 1948, by R. E. [illegible]
(Sworn or affirmed) (Officer in Charge, Marine Inspection)

/s/
R. W. [illegible], LCDR, USCG
Authority, 60 U.S.C. 788

Engineer CG 841 (Rev 10-41) CG-841A, CG-848, CG-848A, CG-848, CG-848A, CG-849, and CG-847 which forms are obsolete

[fol. 33] ATTACHMENT TO ANSWERS

File No. V TB-1912

CERTIFICATE AMENDING CERTIFICATE OF INSPECTION BY CHANGING CHARACTER OF VESSEL, ROUTE, EQUIPMENT, ETC.

UNITED STATES COAST GUARD
MARINE INSPECTION OFFICE
PORT OF Huntington, West Virginia

DATE 26 October 1955

THIS CERTIFIES, That the following-described amendments are hereby authorized in the certificate of inspection expiring on 1 April, 1956, issued to the tank barge vessel named CC-204 Off. No. ..... of 593 gross tons, home port South Charleston, West Virginia classed as Tank Barge, built at Neville Island in the State of Pennsylvania, in the year 1948, and certificated at Huntington, in the State of West Virginia

namely: Vessel Drydocked at Reed, West Virginia
13 October 1955

2-year survey completed
SubC. "D" Sec. 31.10-20 (a) (2)

/s/ W. H. FULLER, CDR., USCG
Acting Officer in Charge, Marine Inspection.

The original of this certificate will be delivered to the master or owner of the vessel to which it relates, which certificate must be framed under glass and posted on board near the certificate of inspection or examination, if the certificate of inspection or examination is required to be posted; or kept on board with the original certificate of inspection or examination, if the certificate of inspection or examination is not required to be posted, to be shown on demand.

One copy of this certificate will be delivered to the chief officer of customs of the district in which the copy of the original certificate of inspection or examination was filed.

One copy of this certificate will be filed with the copy of the certificate of inspection or examination that it amends in the office of the Officer in Charge, Marine Inspection.

Any additional equipments required must be stated herein.

Certificate of Service (omitted in printing).

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

AMENDMENT TO ANSWER OF DEFENDANT, UNION CARBIDE AND CARBON CORPORATION, A CORPORATION, TO THE COMPLAINT FILED HEREIN AGAINST IT—Filed May 13, 1957

THIRTEENTH DEFENSE

The defendant says that the plaintiff cannot recover upon its said supposed cause of action herein for the additional reason that the same is barred by the assumption of risk incident to plaintiff's decedent's employment by commencing and continuing the work which he was performing at the time of his death with full knowledge of the facts, circumstances and conditions surrounding the same whereby he assumed the risks incident thereto.

Wherefore, this defendant again denies all liability and responsibility for said accident, if any, and alleges that defendant was free from all negligence and that recovery, if any, to which plaintiff may be entitled is against the third-[fol. 35] party defendant, and again asks to be dismissed with its reasonable costs about its defense in its behalf expended.

Dayton, Campbell & Love, Charles M. Love, Attorneys for Union Carbide and Carbon Corporation, Address: 1100 Security Building, Charleston, West Virginia.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

AMENDED AND SUPPLEMENTAL ANSWER OF AMHERST BARGE COMPANY, A CORPORATION—Filed May 13, 1957

In addition to the defenses heretofore set up, the third-party defendant avers these further defenses:

1. If either the defendant Union Carbide & Carbon Corporation, a corporation, or the third-party defendant was guilty of any negligence causing or contributing to the death of the decedent, Marvin Paul Goett, then this third-party defendant avers that the said Marvin Paul Goett was also guilty of contributory negligence which proximately caused or proximately contributed to his death and bars this cause of action.

2. This third-party defendant further avers that the said decedent assumed the risks incident to the employment [fol. 37] in which he was engaged at the time of his death and that his death grew out of these risks and that therefore under the doctrine of assumption of risk that this cause of action is barred.

Jackson Kelly Holt & O'Farrell, W. T. O'Farrell, H. D. Johnson, Attorneys for Amherst Barge Company, a corporation, Address: 1601 Kanawha Valley Building, Charleston, West Virginia.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWERS OF AMHERST BARGE COMPANY TO INTERROGATORIES PROPOUNDED TO IT BY PLAINTIFF—Filed May 13, 1957

1. State the first date of employment of Marvin Paul Goett, deceased, by the Amherst Barge Company.

January 7, 1954.

2. State whether said deceased was steadily employed since that first date by the Amherst Barge Company until the date of his death and the capacity in which he was so employed.

No. He was employed January 7, 1954, to April 30, 1954, and was laid off until April 21, 1955, when he was re-employed and continued working until the date of his death.

3. State the daily wages of said deceased and his total wages earned from the first date of employment until the date of his death.

[fol. 39] His daily wage at the time of his death was $14.98. His total wages earned during all periods of employment by Amherst Barge Company was $2,510.14.

4. State the duties of said deceased on the date of his accident and subsequent death.

Sandblasting.

5. State the date that the vessel CC-204 was delivered to the Amherst Barge Company.

October 1, 1955.

6. State the place where the vessel was delivered and whether said vessel was afloat or in drydock at the time of delivery.

Reed, West Virginia, afloat.

7. State whether the vessel was afloat or in drydock at the time of the accident and death of the deceased.

Afloat.

8. State the date on which the vessel was first placed in drydock during the repair operation on which the accident and death complained of herein occurred.

The vessel was not placed in drydock during the repair operation; but it was placed on a side haul marine railway on October 7, 1955.

9. State whether it was customary for Amherst Barge Company to drydock the vessel immediately upon delivery for the purpose of repairing, sandblasting and painting of the CC-204, or whether it was the custom of Amherst Barge Company to proceed with the repairing, sandblasting and painting operation as much as was possible while the vessel was afloat.

There was no "custom" in this regard; but, generally, it was the practice to do as much repair work as possible while vessels were still afloat.

[fol. 40] 10. State whether the Amherst Barge Company ever previously contracted with Union Carbide & Carbon Corporation for similar repairs on similar vessels, and, if so, state the dates of such contracts for the five years previous to October, 1955.

Yes, Purchase Order No. 514-73361, for Barge CC-206, May 12, 1955.

11. State whether the vessels involved in the previous interrogatory were delivered by Union Carbide & Carbon Corporation to the Amherst Barge Company afloat or in drydock for each of the periods as set forth in the preceding interrogatory.

Afloat.

12. State the date and time of day that the CC-204 was inspected by the Amherst Barge Company and the name and capacity of the party who inspected the vessel.

On October 2nd, at 10:30 A.M., Rex Buckley, an independent inspector, made a gas examination of the barge and rendered a gas free certificate, for which services he was paid by Amherst. On October 3rd, Frederick P. Martin, Amherst's superintendent of maintenance, went on board the barge in company with Mr. Fred Prichard of Carbide, and examined the barge and discussed the work to be done

on the barge. Other supervisory personnel were on board for various purposes from time to time, from that time on.

13. State whether on said inspection the following life-saving equipment was aboard the vessel as part of the gear and appurtenances of said vessel:

(a) lifeboats; (b) life raft; (c) life preserver; (d) safety nets; (e) safety ropes; (f) life jackets; (g) life buoys.

[fol. 41] No such equipment was board the boat as part of its gear and appurtenances.

14. State whether the superintendent or supervisor of the Amherst Barge Company dock area was aboard the vessel at any time prior to the death of the deceased and while the deceased was engaged in the performance of his duties aboard the vessel, and if so, state the date and the purpose of boarding said vessel.

Yes, from October 3rd on, at frequent intervals each day, for varied purposes pertaining to the work in progress.

15. State whether, at any time prior to the accident and death of the deceased, Amherst Barge Company had available for the health and safety of its employees aboard vessels afloat in the river the following equipment:

(a) lifeboats; (b) life raft; (c) life preserver; (d) safety nets; (e) safety ropes; (f) life jackets; (g) life buoys

Life rings were located on the "digger" boat and tow boats. Life jackets were located in supply house and on tow boats. Yawls and life boards were on tow boats, and there was another yawl at the Reed dock. There were two "caulking flats" at the Reed dock.

16. If any subdivisions of interrogatory 15 were answered in the affirmative, state the quantity of said equipment available, the name and model number of said equipment, the date purchased and the company purchased from.

Life jackets were "TA-PAT-CO", model No. 206, purchased from American Pad and Textile Company, Greenfield, Ohio, at varying times when replacements were

needed. Life rings were 30 inches, with approximately 75 feet of line attached, purchased from Capital City Supply Company, Charleston, West Virginia, at varying times, USCG approved. Make and model of other equipment is not ascertained.

[fol. 42] 17. If any subdivisions of interrogatory 15 were answered in the affirmative, state where said equipment was storaged by the Amherst Barge Company and the distance in feet from the place of storage and the position of the CC-204 at the time of the accident and death of the deceased.

Approximately 100 life jackets were located in the supply house, approximately 250 feet from the CC-204. There was a life ring and attacked line on the "digger" boat approximately 35 feet from CC-204. There was a "caulking flat" along side the CC-204. There was a yawl approximately 250 feet from the CC-204.

18. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the deceased was instructed by the Amherst Barge Company in the use of said equipment and, if so, state t.. date or dates of said instruction and the person by whom the instruction was given.

The use and location of safety equipment was a matter of general knowledge and observation and was the subject of universal discussion by and between all employees and supervisors.

19. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the deceased was given said equipment for his health and safety on the date of his accident and death.

Such equipment was furnished to him and was available to him for his use.

20. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the Amherst Barge Company had in force and effect a policy of enforcement of the use of said equipment by its employees going aboard vessels afloat in the river and, if so, what arrangements by way of supervision and inspection did the Amherst

Barge Company have as company policy for said enforce
[fols. 43-48] ment.

Life jackets were furnished to and were available for use of any and all employees. Mandatory use of such equipment had been a long standing subject of discussion and negotiations between the Company and the Union.

21. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether said equipment was placed aboard the CC-204 at any time from the delivery of said vessel by Union Carbide & Carbon Corporation up until the moment of the accident and death of the deceased.

No.

W. F. Miller, As Secretary of Amherst Barge Company.

Duly sworn to by W. F. Miller, jurat omitted in printing.

[fol. 57] [File endorsement omitted]

[fol. 58]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant and Third-Party Plaintiff,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

Transcript of Proceedings—May 13, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 13th day of May, 1957.

APPEARANCES:

Mr. Harvey Goldstein, Mr. E. Franklin Pauley (Pauley & Andrews), and Mr. S. Eldridge Sampliner, counsel for plaintiff.

Mr. Charles M. Love (Dayton, Campbell & Love), and Messrs. William Carter and R. M. Brown, counsel for Union Carbide & Carbon Corporation.

Messrs. W. T. O'Farrell and David D. Johnson (Jackson, Kelly, Holt & O'Farrell), counsel for Amherst Barge Company.

* * * * * * * * *

[fol. 62] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Johnson: Your honor, we have an amended and supplemental answer which clarifies the matter of contributory negligence and which would add as an additional defense the defense of assumption of risk.

* * * * * * *

[fol. 66] The Court: And we are going to permit the filing of the defense of assumption of risk and we are going to rule that a defense of contributory negligence and assumption of risk are both available in this case if they are shown.

* * * * * * *

Mr. Goldstein: At this time, sir, I would like to move that your honor rule on this matter on the question of damages in an alternative ruling.

The Court: I will overrule your motion. We have gone into that. We spent a whole day in pretrial conference in which I told you that there would be no rulings prior to the trial of the case other than were necessary to define the issues, and this is just simply a wrongful death case being tried under the admiralty rules but with all the substantive law of the state applicable to it.

* * * * * * *

[fol. 67] The Court: I am ready for your opening statement. Go ahead, gentlemen.

Mr. Goldstein: . . .

. . . . . .

[fol. 68] He had evidently fallen overboard. How or why is completely unknown. There is absolutely no evidence and no proof I believe will be offered by either side to establish how or why Marvin Goett fell off the vessel.

. . . . . .

[fol. 71] Mr. Goldstein: . . . The action is brought solely on the doctrine of unseaworthiness.

. . . . . .

[fol. 75] STATEMENT OF MR. JOHNSON

Mr. Johnson: I am speaking for Amherst now but necessarily I think our position is that if Carbide was not guilty of fault in this matter and there can be no recovery against Carbide, that there can be no recovery against Amherst, because the only possible basis for recovery against Amherst, as we see it, is on the theory of indemnification of Carbide and Amherst is protected by its coverage under the Longshoremen's and Harbor Workers' Compensation Act, which provides that the benefits provided by that act shall be the sole liability of the employer for the death or injury of its employes.

The Court: Who was employing Goett?

Mr. Johnson: Amherst. He was our employe, and as to any recovery by the administrator against us directly, we are protected, we maintain, by our coverage under the Longshoremen's and Harbor Workers' Compensation Act.

[fol. 76] As to Amherst, our only liability in this case as we see it can arise through an implied or express contract to indemnify Carbide for any liability that they may have on account of the death of our employe.

The Court: I think you should explain this definition of coverage under the longshoremen's act. I don't know that I understand that.

Mr. Johnson: Your honor, Amherst, Mr. Goett's employer, is covered—that is, it has provided the coverage which the law requires for its employes who are within the application of the Longshoremen's and Harbor Workers'

Act. That act provides that upon the death or injury of one of Amherst's employes the benefits which the act provides and which the act requires Amherst to afford to the injured workman or his beneficiaries, that that shall be the sole liability of the employer for the injury or death of that employe.

We think it clear from the facts of this case and the nature of Mr. Goett's employment that he was within the coverage and application of the Longshoremen's and Harbor Workers' Compensation Act.

We, in fact, represent the Amherst Barge Company's insurance carrier which provided the longshoremen's coverage applicable to this matter. We have at all times taken [fol. 77] the position that the case was within the application of the longshoremen's act. We stand ready at any time to honor this claim to the full extent of our obligation under that law.

. . . . . .

[fol. 78] Mr. Johnson: There is a whole line of these cases which have, I think, established the doctrine so far as unseaworthiness is concerned that if the owner of the vessel is liable, if, as I say, its liability arises not from its own active fault but arises simply by imposition of law on the active fault of the independent contractor, then he may recover from the employer, the independent contractor, despite that provision of the longshoremen's act which says that the benefits provided by that act shall be the sole measure of sole liability against the employer.

. . . . . .

[fol. 79] Mr. Johnson:

. . . . . .

It is our position that he assumed not only the ordinary risks of his employment but the extraordinary risks of his employment insofar as they were known to him, including the negligent failure, if any, of his employer or the owner of the vessel to provide him with a safe place to work, which as I understand it is the heart and essence of the plaintiff's case here.

. . . . . .

[fol. 81] We will rely on the proposition of law that from the time that this barge was turned over to Amherst, at least, that Carbide cannot be held liable for the neglect or fault of Amherst in anything that was done, if there was any such fault or neglect, which we deny; that therefore the failure to rescue and the failure to provide rescue equipment, which Mr. Goldstein apparently makes a great deal of and which is apparently the heart and essence of his case, cannot make Carbide liable in this case to the plaintiff.

. . . . . .

[fol. 85] STATEMENT OF MR. O'FARRELL

Mr. O'Farrell: Under the provisions of the Longshoremen's and Harbor Workers' Act, to which Amherst was a [fol. 86] subscriber, a recovery by the injured employe or by the estate of the injured employe inures to the benefit of the employer or the employer's insurance carrier to the amount of that recovery. In other words, if there is a recovery here that recovery, less the attorney's fee, will inure to the benefit of Amherst or its insurance carrier.

Furthermore, if it is pertinent in this case we can show —and by "we" I mean the defendant Amherst and the insurance carrier covering Amherst—that the insurance carrier's actuaries have determined that from an actuarial standpoint the recovery which will be made by the beneficiaries of the decedent's estate will exceed $20,000.

The importance of that statement is obvious to his honor. His honor has held that there cannot be a recovery, if there is a recovery in this case, in excess of $20,000, the amount of limitation of the wrongful death statute of the State of West Virginia.

I repeat that it is my conclusion—and I think counsel for the plaintiff ought to correct me if I am wrong—that if there is a recovery in this case it cannot under your honor's ruling exceed $20,000. If it cannot exceed $20,000, then all we really are debating over here is an attorney's fee because from that recovery, of course, will be deducted the [fol. 87] amount of the attorney's fee of plaintiff's counsel. The remainder of the recovery, if there is one, will be given as a credit to Amherst's insurance carrier against the

amount which Amherst's insurance carrier will owe to the widow and the children of the decedent.

. . . . . .

[fol. 92] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I am not going to permit you to recover on the basis of some default of Amherst for which you are compensable under the Longshoremen's and Harbor Workers' Act and then recover against Carbide for the same thing and then say that because of this imputed liability of Carbide that Amherst's insurance carrier is not entitled to any credit.

Mr. Goldstein: We don't say that at all. If I have given [fol. 93] you that impression, I am sorry. There is no question but that any amount that we recover from Union Carbide and Carbon less attorney's fee must go as a credit to the insurance carrier.

. . . . . .

[fol. 94] Mr. Goldstein: At this time I would like to move to place in the record the entire complaint and trial memorandum of the libelant. I would like to enter into the record all of the pleadings that have heretofore been filed in the civil action which is now an admiralty action for the first time today, including the answers of both Union Carbide and Carbon Corporation and Amherst Barge Company to interrogatories propounded to them by the plaintiff.

. . . . . .

[fol. 103] Mr. O'Farrell: Your honor, I think the method the court has indicated is clearly applicable for this reason. Counsel for Amherst has stated in open court as part of the opening statement that it is local counsel for the Travelers Insurance Company, which carries the harbor workers' [fol. 104] and longshoremen's compensation on the decedent, that the Travelers Insurance Company has recognized the validity of the decedent's estate's claim, that its actuaries have computed the benefits, that the actuarial computation shows that based upon statistics and actuarial statistics that the payments to the estate of the decedent or the dependents of decedent will exceed the sum of $20,000 —I say the sum of $20,000, which is the maximum that your

honor has ruled can be recovered in this action, and therefore under your honor's ruling this action concerns itself solely with one question, and that is the attorney's fee that counsel for the plaintiff may derive from this action, because there is no question but that the amount of recovery in this action, if there were a recovery on behalf of the plaintiff, would first be credited, less the attorney's fee, upon the amount that Amherst or its insurance carrier owes to the beneficiaries of the decedent, and therefore—

The Court: What you are saying about the only controversy being over attorney's fee applies to the trial court.

Mr. O'Farrell: Yes, your honor.

The Court: In the appellate court, of course, there is a very different controversy, which is whether or not there is a limitation on the recovery.

[fol. 105] Mr. O'Farrell: I agree with your honor. As I understand the facts that are not admitted in the opening statements, that is the only item of controversy in this matter. That is, whether or not the plaintiff's recovery, if the plaintiff makes one, is limited to a maximum of $20,000; and I take it that if the procedure outlined by your honor is followed, that that will be the primary issue presented in the appellate court.

The Court: Not the only issue. I have passed on three matters so far: one, that the limitation of $20,000 in the West Virginia statute is applicable here; two, that the defense of contributory negligence if proved is a complete bar; three, that the defense of assumption of risk may be made, and if proved that that is a complete bar.

. . . . . .

[fol. 107] The Court: I don't so interpret it. I think that I would be going outside my judicial office if I should pass on what would be the damages under a theory of law that I believe is not applicable to the case.

. . . . . .

[fol. 129] The Court: I am going to hear argument on that later before I finally dispose of it, so I think now we are up to the point of your introducing your evidence to maintain the unseaworthiness of the vessel and the extent of the damages.

. . . . . .

[fol. 131] ROBERT M. RIGGALL called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Robert M. Riggall.

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?
A. Robert M. Riggall.
Q. Where do you live, Mr. Riggall?
A. At 3521 Hatfield Drive.
Q. What is your occupation?
A. Machinist helper.
Q. For whom do you work?
A. Amherst Barge.
Q. What age are you, Mr. Riggall?
A. Thirty-five.
Q. How long have you worked for Amherst Barge?
A. Ever since they taken over from Hatfield Campbell's Creek. I have been with the company for nine years.
Q. Mr. Riggall, directing your attention to October the 5th, 1955, where were you working then?
A. Working on the barge.
[fol. 132] Q. Which barge was that you were working on?
A. I don't remember the name of it. It was a steel barge we were working on for Carbide.
Q. Where was that barge located?
A. It was in the river at the foot of the road that goes down to the digger boat.
Q. And what place is that, at Reed?
A. The docks at Reed, the lower dry docks.
Q. If you remember, where was that dock moored?
A. It was moored to the digger boat and the digger boat was moored on the bank, fastened to the bank.
Q. The digger boat, was that down the river from the barge?
A. Down the river inside.

Q. Was there any free space between the digger boat and the barge, if you remember?

A. Enough to float the barge. Enough water to float the barge. I couldn't say how much.

Q. Was the barge entirely afloat in the river?

A. Yes, sir.

Q. Both the front end and the back end. Is that right?

A. That's right.

Q. Or the upriver side and downriver side?

[fol. 133] The Court: Do I understand this thing you call a digger boat is not in the water?

The Witness: Yes, it is in the water but it is more stationary. It stays at one place.

The Court: You said there was enough water in between there to float the barge. Any space was enough.

The Witness: What I meant, the barge was far enough out from the bank. It was not on the dry bank. There was water under the barge at all times.

The Court: Now you are talking about a space between the barge and the bank. Mr. Pauley asked you about space between the digger boat and the barge.

The Witness: On the end?

By Mr. Pauley:

Q. That's right.

A. It was tied. I misunderstood you. It was tied to the digger boat, pulled in against it.

Q. Was it entirely flush with it?

Q. You mean was it even?

Q. Yes, was there any free space between there?

A. I don't know about that, how much would be free space between them. I know it was butted up against it, tied up to it.

Q. And it was entirely afloat in the river, the barge?

[fol. 134] A. Yes.

Q. How high was that barge, the deck of the barge, from the surface of the river?

A. I think about nine feet.

Q. Will you describe to the court the type of barge it was with reference to the deck?

A. It was a flat top cargo barge with about a six inch crown.

Q. It was a solid top barge. Is that correct?

A. What?

Q. It had a solid top?

A. That's right. It had hatchways in it.

Q. Did it have any other equipment or fixtures on it?

A. Pipelines.

Mr. Love: I can't hear. I am sorry.

A. Pipelines.

Q. Mr. Riggall—

The Court: By six inch crown you mean it is six inches higher in the center than on the sides?

The Witness: Yes, slopes to both sides.

The Court: All right.

Q. Mr. Riggall, directing your attention to about 1:00 o'clock on the 5th day of October, do you recall who was on [fol. 135] the deck of that barge on that day?

A. I can recall some of them. I don't know whether I can recall them all or not.

Q. Who was there?

A. Harold McCormick, Homer Schultz and Tommy Hammons and myself.

Q. What were you doing on that barge?

A. What was I doing?

Q. Yes.

A. I was cutting Butterworth hatches.

Q. You say you were cutting Butterworth hatches. What were you cutting them with?

A. I was cutting holes in the top of the deck that the hatches go in. We were putting in new hatches.

Q. And you are a welder, are you?

A. Well, I do welding work. I was doing cutting work that day with a torch.

Q. Do you remember seeing Mr Goett on that barge?

A. Yes, sir.

Q. When did you see him and where was he located when you saw him?

A. Well, when I saw him I would say he was approximately the center of the barge, the last time I saw him.

[fol. 136] Q. When did you next see him after that?

A. When he was in the river, when I looked over the side of the barge.

Q. Will you describe to the court just what you saw happen there and what you did?

A. Well, we were cutting the hatchways in the barge. I heard the hose pecking against the side of the barge.

Q. Which hose was that?

A. That's the sandblasting hose.

Q. And Mr. Goett was sandblasting, was he?

A. Yes, sir.

Q. All right, sir. Go ahead.

A. I looked around. They generally peck like that when they want more sand, and I just happened to look around and saw the hose was over the side of the barge.

Q. Where was that located on the barge? Where did you see the hose over the side of the barge?

A. About the quarter bit. That's quarter way back on the barge from the upper end.

Q. Taking this diagram here, assume that this is the digger boat here, this arrow points down the river. Were you on the downriver end of the barge?

A. May I show you on that?

[fol. 137] Q. Yes, sir. Come over here and show me.

A. I was approximately along here. (Indicating on blackboard.)

Q. You were on the barge up the river about a quarter of the way? Is that correct?

A. Yes. I would say I was a quarter of the way on the inside, on the bank side.

Q. Where was Goett?

A. The last time I saw him he was approximately here in the center of the barge.

Q. That's up the river from you?

A. Up the river.

Q. And how far from the upriver end of the barge?

A. Well, I couldn't say. It was, I would say it was a quarter way back the length of the barge.

Q. And do you know the length of the barge?

A. No, sir.

Q. Would you estimate the length of that barge?

A. 200 feet.

Q. All right, sir. And you say you heard the nozzle of the sandblaster hitting the boat, is that right, the side of the boat?

A. Yes, sir.

[fol. 138] Q. What did you do then, if anything?

A. I looked around and saw the hose over the side of the barge, so I run up, I got my cousin Harold A. McCormick. We went up that way and looked over the side and Goett was in the water. Harold went over the side after him. I run to the other side to get a piece of rope or something to throw down to them. Well, there wasn't nothing and so I come back and he had McCormick and they both were going down, down in the water.

Q. That's McCormick and Goett?

A. That's right, McCormick and Goett. So I jumped over the side to try to save one or the other of them, tried to get them apart, to get them back up on the surface.

Q. Now, when you ran over there or went over to the side and saw Goett in the water, what did you observe if anything about his actions in the water?

A. Well, he was paddling in the water, what we call dog fashion, just clawing at the water like that. (Indicating)

Q. Did you observe whether he was swimming or entirely collected, or what was your observation, if anything, about his condition there?

A. All I could say he was either fighting at the water or pawing at the water like he was trying to swim.

Q. And you saw Harold McCormick dive in after him?

[fol. 139] A. Yes, sir.

Q. What did you say happened then? Did McCormick get him or not?

A. McCormick had hold of him and when I got back to that side they both seemed to be in a clinch and seemed to be going down, so I thought I had better get in and try to help them.

Q. And you dove in, then, to get them?

A. Yes, sir, and just as I hit the water I guess the force of that or my weight broke them apart and Goett threw his

arm across my face and he seemed to reach his arms up and slide away.

Q. Went beneath the surface?

A. Yes.

Q. What if anything did you do after that?

A. What did I do?

Q. Yes.

A. Got over to the side of the barge, reached the barge. There was a wearing strip.

Q. What is a wearing strip?

A. It is a piece of metal they put on the side of the barge to keep the lock walls from wearing the barges.

Q. How wide is that?

A. I think they are five and a half inches, about two [fol. 140] foot long. They can be two foot. We have made them longer.

Q. How are they affixed to the side of the barge?

A. They are welded.

Q. You say you were holding onto the wearing strip?

A. Yes.

Q. How much of a hold could you get on that wearing strip, if any?

A. I would say approximately half to five-eighths of an inch thick.

Q. Will you just show how you had hold of that wearing strip?

A. Approximately like that. (Indicating)

Q. About the first joints of your fingers?

A. Yes.

Q. Where was McCormick when you were holding onto the wearing strip?

A. He was right above me, on the same strip above me. He was up the river side from me. I was below him.

Q. I believe you said that you looked for a rope to throw in to them before you went into the water. Is that correct?

A. Yes, sir.

Q. Were you able to find anything in the nature of a rope or throw line?

[fol. 141] A. No, sir.

Q. You know what a ring buoy is, don't you, Mr. Riggall?

A. Yes, sir.

Q. What is that, Mr. Riggall?

A. It is a round buoy. It is made out of cork covered with canvas and has a rope laced through that, and another rope is tied to that, another length of rope.

Q. Were there any such ring buoys on that barge?

A. No, sir, not on the barge. There was one on the digger boat.

Q. How far was the digger boat from you at the time?

A. The length of the barge, but it was tied at the low end of the barge. It would be the length of the barge away.

Q. I believe you said that barge was approximately 200 feet long.

A. 200 feet.

Q. And you were on the upper quarter part. Is that correct?

A. Yes, sir.

Q. Did you know about the ring buoy being located on the digger boat?

A. Yes, sir.

Q. Did you attempt to get to that ring buoy?

[fol. 142] A. No, sir, I never thought about it.

Q. Had you had any specific instructions relative to the lifesaving equipment on the digger boat?

A. No, sir, not other than just knowing it was there.

Q. Were there any throw lines of any type on that barge?

A. No, sir.

Q. Was there any other livesaving or rescue equipment on the barge itself?

A. No, sir.

Q. Where you men were working?

A. No, sir.

Q. If you know, did Mr. Goett have a life jacket?

A. No, sir.

Q. Tell me how were you clothed that day on the barge.

A. You mean myself?

Q. Yes, sir.

A. I had on a pair of overalls, blue shirt, a pair of hard toed work shoes.

Q. Did you strip before you went into the water or did you dive in with your clothing?

A. No, sir, I dived in just as I was. I didn't dive. I jumped.

Q. Did anyone else on that barge while they were work-
[fol. 143] ing there have a life jacket?

A. No, sir.

. . . . . .

[fol. 145] The Court: Maybe so, but you are asking him whether he, the witness, has in the past been in the habit of wearing life jackets in his work. I fail to see the connection between that and a claim for unseaworthiness on the part of the vessel.

. . . . . .

[fol. 148] By Mr. Pauley:

Q. How many days did you work on that barge before the death of Mr. Goett?

A. Two, I believe, the best I can remember.

Q. And do you recall—

A. It was the second day that it happened. That would have been my second day. One day before.

Q. Was that a full eight hour day?

A. I don't remember.

Q. The first day? If you remember, was there any life-saving apparatus whatsoever on that barge?

A. No, sir, not as I recall.

Mr. Love: We would object to that question and move to strike the answer because there is no showing that there is any lifesaving equipment required to be on an unmanned barge.

The Court: I think that the description of the barge has been introduced and it is a question of fixing a standard [fol. 149] for what equipment should be on that kind of a barge. I take it that this will be followed up by further evidence. Overruled.

By Mr. Pauley:

Q. If you remember, were there any lines around the edge of that barge?

A. No, sir.
Q. On the water side?
A. No, sir.

Mr. Love: The same objection.

Q. If you remember, were there any skiffs or boats moored close to the barge?

Mr. Love: Same objection.
The Court: Overruled.

A. By close, how close do you mean?
Q. Tell me where the closest one was located.
A. I would say up the lower end of our fleet. It is a thousand feet.
Q. Away from the barge?
A. Yes, sir, up the river side.

The Court: Any ropes? You may have been asked that. I don't remember.
The Witness: Any ropes on the barge?
The Court: Yes.
[fol. 150] Mr. Love: Same objection.
The Witness: Just what it was tied with.
The Court: That is, no loose ropes?
The Witness: No, sir.

By Mr. Pauley:

Q. Well, now, is it a fair statement, Mr. Riggall, to say there was absolutely no lifesaving equipment such as ropes or anything else on that barge?

A. As far as I saw, none.

Examination by the Court:

Q. Was there any type of railing or raised gunwale on the barge?

Mr. Love: That would be the same objection.
The Court: Yes.

A. You mean on the outer edge?

Q. On the outer edge.

A. No, sir.

Q. There was just a flooring on the top of the barge which slanted six inches altogether from the center and went [fol. 151] right out flush with the side?

A. Yes, sir, and there is a pipeline goes down the middle. That's the only raised place on the barge.

Q. Was there anything to indicate other than just the sight of your eyes when you were getting close to the edge?

A. No, sir, not unless you would happen to have been close to a kevel.

Q. What is that?

A. That's what they tie the barge with.

Q. Is it a post?

A. Most have posts, but these had kevels. They are long pieces of metal. I don't know exactly how to explain it, but they sit in ten or twelve inches from the edge of the barge. There is four of them, I believe, spaced on the barge.

Q. Are they raised up?

A. Yes, sir, they tie ropes around them. I would say approximately eight inches, six to eight inches.

Q. There are only four the entire length?

A. The best I can remember I think that's what it is.

Q. Four on each side?

A. Yes, sir, four on each side.

The Court: That means they would be about fifty feet apart, something like that.

. . . . . .

[fol. 152] By Mr. Pauley:

Q. Mr. Riggall, I show you a picture of a barge afloat in the water. Is that the same type barge, if you recall, that you were working on that day?

A. Yes, sir.

Q. And is that barge loaded or empty in that picture, if you can tell?

A. Well, to look at it I would say the barge was loaded.

Q. And how high did the deck of that barge float from the surface of the water when you were working on it that day?

The Court: I think he said nine feet.

A. Nine feet. Here is what I was talking about, the kevels.

Q. Point out to his honor there the kevels on that and the number of them on that barge.

A. (Indicating to the court.)

The Court: On this barge there are a good many more of those than you said were on the other barge?

The Witness: We have them on our barges. I guess we [fol. 153] have four on our barges. We have the double timberhead, the quarter bit, then the center bit, then another quarter bit, then a double timberhead. That's the way our barges are made up and that's what I was going on. When I went on the barge I went on to cut and didn't pay any attention to how many it had on it, but I do know it had kevels on it.

The Court: This is not a picture of the identical barge?

The Witness: It is an identical barge. What I was talking about was our barge, our coal barges. That's what I was going by.

Mr. Goldstein: If your honor please, this is the identical barge except that this was loaded when these pictures were taken.

OFFER IN EVIDENCE

The Court: Are you introducing that in evidence?

Mr. Goldstein: Yes, sir.

Mr. Love: That is not an exactly accurate statement. It was partly loaded, I think, then.

The Court: This picture will be admitted in evidence.

Mr. Pauley: Plaintiff's Exhibit Number 1.

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[fol. 154] Cross examination.

By Mr. Johnson:

Q. Mr. Riggall, you say that you did know that there was a life preserver ring on board the digger boat?

A. Yes, sir.

Q. You had seen it there, I take it.
A. I had seen it there several times.
Q. And you knew where it was located?
A. Yes, sir.
Q. But at the time Mr. Goett fell in the water I believe you said that the thought never occurred to you to go get that particular ring.
A. No, sir, it didn't.
Q. You never thought of that ring?
A. No, sir.
Q. If you had thought of it, you could simply have moved down the barge to the digger boat and have obtained it without any difficulty. Isn't that true?
A. Yes, sir. There was nothing in the way.
Q. And I believe you said that there was a ladder there.

[fol. 155] Mr. Pauley: I didn't hear that answer.
The Witness: I said no, sir, there wasn't nothing in the way. He asked me if I could go through the barge and to the digger boat. I could.

Q. I believe you said, Mr. Riggall, that there was a ladder you had to go down to get from the barge.
A. The best I remember there was a ladder.
Q. How many steps were there?
A. I would say not over eleven. I think they are eight inch centers, I believe, as much as I can remember.
Q. Wasn't it only a short distance between the elevation of the deck of the digger boat and the elevation of the deck of the barge?
A. Yes, sir. I would say not over five to six feet.

The Court: How long would it have taken you to go from where you were to the buoy, get it, bring it back?
The Witness: That would be hard to say accurately. Not over a minute at the most, I would say, running; a minute and a half.
The Court: Could you have done it within the length of time that you spent on the deck trying to find something?
The Witness: Yes, sir. I would say I could because I went to the upper end of the barge and back and looked [fol. 156] around. I would say I could.

The Court: Now, tell me what this buoy is.

The Witness: You mean describe it to you?

The Court: Yes.

The Witness: It is a round type made out of cork, covered with canvas, and it has a rope lacing around it and then in that rope lacing there is laced most of the time a fifty to a seventy-five foot rope, and when you throw it you hold to the rope.

The Court: It is really a life preserver that you throw to somebody in the water and hold the rope and the person in the water grabs the ring and that keeps them from sinking?

The Witness: That's right.

The Court: All right.

By Mr. Johnson:

Q. When you went to the edge of the barge and looked in did you see Mr. Goett on the surface of the water?

A. Yes, sir.

Q. Was it immediately that Mr. McCormick went over the side into the water after him?

A. Yes, sir.

Q. And he got hold of him?

A. Yes, sir.

[fol. 157] Q. Isn't it true that when Mr. McCormick did get hold of Mr. Goett, Mr. Goett fought him?

A. Yes, sir.

Q. And broke his hold, I believe, isn't that true? That is, broke the hold that Mr. McCormick had upon him?

A. I couldn't say whether he broke his hold. I broke the hold when I jumped in.

Q. Do you recall when you testified before an investigator for the United States Coast Guard about this matter?

A. Yes, sir.

Q. In that investigation didn't you state that Mr. Goett broke Mr. McCormick's hold by fighting him in the water?

A. I don't remember, but I do know I told them he was fighting.

Q. And you saw them fighting in the water?

A. Yes, I saw them struggling.

Q. And you jumped?

A. That's how come me to jump in after them. He was fighting and holding to him and to look down it looked like they were both going under the water.

Q. You jumped into the water yourself?

A. Yes, sir.

Q. How long after you first noticed Mr. Goett in the [fol. 158] water was it that you jumped in?

A. I would say approximately three or four minutes.

Q. Was anyone else in the water besides Mr. McCormick and Mr. Goett at the time you went in?

A. No, sir.

Q. Did somebody go in subsequently?

A. Mr. Schultz went in after I did.

Q. Did you go in the water when Mr. Goett was still on the surface of the water?

A. Yes, sir.

Q. And what about Mr. Schultz? Was he still on the surface when Schultz went in?

A. The best I can remember he had just started to slip under the water. He had gone under the water when Homer jumped in to try to pick him up as he went down.

Q. Then there were three of you actually in the water besides Mr. Goett?

A. Besides Goett.

Q. Did Mr. Goett strike you?

A. Yes, sir.

Q. When you were in the water?

A. Yes, sir. When I broke his hold he threw his arms back like that, hit me across the mouth and knocked me back [fol. 159] towards the barge.

Q. Do you recall Mr. Fred Martin's arrival there on the barge at the place where Mr. Goett had gone overboard?

A. Yes, sir. I would say Mr. Martin come just after Homer went over the side, and he threw him a life ring, threw Homer a life ring, because we were on the side of the barge at the time.

Q. Mr. Martin threw a life ring such as you have described into the water?

A. Yes, sir.

Q. Do you know that that was the life ring from the digger boat?

A. I didn't know it at the time.

Q. Who is Mr. Martin?

A. Do you want me to show him to you?

Q. Just tell us who he is.

A. He is the superintendent of the company where I work, for Amherst Barge.

Q. Do you know where he was working at the time this happened?

A. No, sir. I think he was at the top of the hill. I don't have any idea where he was.

Q. But you say he arrived just after Mr. Schultz went [fol. 160] into the water?

A. Yes, sir.

Q. And threw the ring in the water with a line attached to it?

A. Yes, sir.

Q. Mr. Riggall, is it true that these men that were doing sandblasting, including Mr. Goett, wore a hood of some kind to protect them from the sand?

A. Yes, sir.

Q. Would you describe that for us?

A. It is a canvas hood with a square of glass in the front of it, comes down along over their shoulders, to protect the sand from bouncing back and cutting their skin.

Q. Was Mr. Goett wearing such a hood at the time of his accident?

A. I presume he was. I couldn't say he was because I didn't see him when he went over, but he was at the time I saw him in the middle of the barge.

Q. When you saw him in the water, though, he didn't have that hood on, did he?

A. No, sir.

Q. Did he have that hood on in the water?

A. No, sir.

[fol. 161] Q. Did he also work in a respirator?

A. They wear one, they use one under the hood, but he didn't have one on at the time.

Q. When you saw him in the water he didn't have the respirator on either?

A. No, sir.

Q. Were any of the men working on the CC-204 on this date wearing life jackets?

A. No, sir.

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[fol. 162] By Mr. Johnson:

Q. Let me ask you this, Mr. Riggall. Isn't it true that the Amherst Barge Company kept on hand in its supply house a large quantity of life jackets which were available to the men who worked on the barges if they wanted to use them?

Mr. Goldstein: Objection, sir.

[fol. 163] A. Yes, sir.

* * * * * * *

[fol. 167] By Mr. Johnson:

Q. Where were those life jackets kept, Mr. Riggall?

A. They were kept at the top of the hill in the supply house.

Q. Did you and the other employes who worked on these barges go into the supply house frequently?

A. Yes, sir, several times a day.

Q. And for what purpose did you go in there?

A. We are given tool checks and they also have their tool room in there, and we go in and check out tools.

Q. And you understood that the supplies and equipment in the supply room could be checked out to you on your check as an employe of the company?

A. Yes, sir. They put up notices to that effect, that we could check out as many as five—we have five checks.

Q. You understood, didn't you, if you wanted a life [fol. 168] jacket you could go there to the supply house and get one?

A. Well, I would say if I wanted one, but nobody ever said I needed one. I guess I could have checked one out any time if I had wanted to.

Q. You never tried?

A. I never tried.

Q. Mr. Riggall, are you yourself what you would call an expert swimmer?

A. No, sir.

Q. Are you a competent swimmer?

A. A competent?

Q. Yes. Do you consider yourself able to take care of yourself in the water?

A. Yes, sir, to a certain extent.

Q. Have you had any particular training or experience in swimming?

A. I have had a small amount of training in Scout work.

Q. Were the other men who went in the river, that is, Schultz and McCormick, apparently able swimmers?

A. They seemed to be. Just from that experience is all I could answer. They both seemed to be at the time.

Q. You said that none of you men were wearing life jackets at the time this happened?

[fol. 169] A. That's right.

Q. Isn't it true that you considered that doing the kind of work that you were doing on this barge that you would be just as well off working without a life jacket as you would be with one?

A. In my case, yes, sir, because where I was burning it would also burn. I mean it won't burn—it won't blow up, but it will burn.

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[fol. 171] By Mr. Johnson:

Q. Mr. Riggall, you say that this was the second day that you had worked on this barge?

A. The best I can remember it was the second day.

Q. And was it also the second day that Mr. Goett worked on the barge?

A. Yes, sir, I believe it was.

Q. He was there the day previous?

A. That's right.

Q. All day, if you recall?

A. Well, from the time—I don't remember whether we started work in the morning or the middle of the day. I don't recall it.

Q. You well knew the location of the barge and you knew what was on the barge and what was not on the barge for some time before Mr. Goett fell overboard, didn't you?

A. Yes, sir.

Q. You were entirely familiar, weren't you, with the barge and its design and its location?

A. Yes, sir.

Q. Mr. Riggall, have you ever done your work on barges with a life jacket on, I mean down to the present time?

[fol. 172] A. No, sir. You mean down to now?

Q. Down to now.

A. Yes, sir.

Q. State whether or not you found it to be awkward, uncomfortable and difficult to work with a life jacket on.

A. The work I do, welding, it is an impossibility to weld and keep the weld out of your eyes with a life jacket on. It is almost an impossibility because the jacket comes up, you couldn't get the hood down close enough to keep the light from going under it. If I wear one now I wear it loose so the hood will come under my chin.

Q. Isn't it a fact that a good part of the time you don't wear one at all?

A. No, sir, I sit on it most of the time or have it right where I can reach it.

Q. Doing the type of work you do, you have found it to be impossible to do your work with it on?

A. I would say it would take two life jackets a week if I wore one. It would burn them full of holes from the sparks from the weld.

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[fol. 173] Redirect examination.

By Mr. Pauley:

Q. Mr. Riggall, you say you have been wearing life jackets recently?

A. Yes, sir.

Q. When was the first time you were directed to wear a life jacket while you were in the employment of the Amherst Barge Company?

A. I couldn't recall the date.

Q. Can you give me approximately when it was?

A. It was after the time of the accident.

Q. When you say after the time of the accident you mean after the drowning of Mr. Goett?

A. Yes, sir.

Q. Mr. Riggall, prior to that time you were never directed to wear life jackets, were you?

A. No, sir.

Q. How often are you required to wear a life jacket now?

A. As long as I am on the river.

Q. Working on the boat?

A. Yes, sir.

Q. Mr. Johnson said something about Mr. Goett striking you and fighting while in the water. I believe you also [fol. 174] stated that you were a pretty fair swimmer. Is that correct?

A. I would say I can take care of myself in the water. I can get myself out if I fall in.

Q. I think you did Boy Scout work in swimming, did you not?

A. I have had a small amount of training in Scout work.

Q. Have you ever seen a man drown besides Mr. Goett—

Mr. Johnson: Your honor, I object.

Q. —in your swimming experience?

The Court: I suppose you are leading up to ask him whether this action of Mr. Goett in striking him was just the act of a drowning man.

Mr. Pauley: Yes, sir.

The Court: I don't think you need to prove that. I think we can take that for granted.

Mr. Goldstein: Excuse me, if your honor please. I think what we are trying to prove on that is not only the fact that Mr. Goett was in panic when he fell into the river, but the amount of pain and suffering that is involved, and as your honor will recall under the maritime

law the element of pain and suffering is involved as damages.

The Court: I don't see how you can expect to show the pain and suffering by the fact that a man drowning [fol. 175] hit another.

Mr. Goldstein: No, sir, but I do expect to show there is pain and suffering by panic. Panic is a sense of mental anguish and we will establish at a later time—

The Court: You don't need to go into a lot of proof that a drowning man has panic. We will just take notice of that.

* * * * * * *

By Mr. Pauley:

Q. I believe you said that Mr. Martin threw in the ring buoy that was on the digger boat after Schultz jumped in. Is that correct?

A. Yes, sir.

Q. When Schultz jumped in, if you recall, had Goett already gone down or not?

A. Yes, sir, as I told you before.

Q. So that the ring buoy wasn't thrown to Goett but to Schultz?

A. No, sir, it was thrown to Schultz.

Q. Now, I believe you testified that the digger boat and the barge were tied together. Is that correct?

A. Yes, sir.

Q. Isn't it a fact that the digger boat floats lower in the water than the barge?

A. Yes, sir.

[fol. 176] Q. So that the distance from the bow or top of the barge over the digger boat to the digger boat was how much, if you recall, what distance?

A. I would say between five and six feet.

Q. Tell me, Mr. Riggall, why didn't you run and get that ring buoy and line?

A. Did you ever see a man drowning?

Q. Yes, sir, I have.

A. Well, you don't think about it. All I thought about was getting over the side and getting the man. I never

thought about a ring buoy. I never thought at all about anything at the time like that.

Q. And I believe you said there were two men fighting together in the water.

A. Yes, sir.

Mr. Pauley: That's all.

Recross examination.

By Mr. Johnson:

Q. I take it from your last answer, Mr. Riggall, you felt when you saw Mr. Goett in the water that the thing that needed to be done immediately was for somebody to go in after him. Is that right?

A. That's right. When I come back to the side I figured [fol. 177] it was either I go in and try to save one of them or they were both going to drown in my opinion.

Q. You said since the time of Mr. Goett's drowning some of the men have worn life jackets while at work on the barges. Is that right?

A. Yes, sir.

Q. Isn't it true that all the men don't wear life jackets even now?

A. That's right.

Q. Some do and some don't?

A. Yes, sir. They have them. They are still available and they are still there for them. Once in a while there is a man that don't wear it.

Q. Some of the men wear them part of the time and they don't wear them part of the time. Is that right?

A. That's right.

The Court: Did you say that you are now directed by the company to wear them?

The Witness: Yes, sir.

The Court: Well, what other men doing what type of work are also directed by the company to wear the life jackets?

The Witness: Anyone that is going out on the barges to do work of any kind.

[fol. 178] The Court: All right.

The Witness: As long as they are going to be on the barges.

Mr. Goldstein: It your honor please, may I ask one question, please? You say you were directed after the accident to wear life preservers or life jackets. Were you ever directed before the accident to wear life jackets?

The Witness: No, sir. I told you no, sir.

The Court: That's been answered and he said no.

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Mr. Pauley: Mr. Harold McCormick.

HAROLD L. MCCORMICK called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Harold L. McCormick.

The Court: Let me suggest now that probably a good deal of the evidence of this man is cumulative, and such part of this evidence as is merely cumulative and is not going to be contradicted does not need to be rehashed. [fol. 179] Are they any facts that Mr. Riggall testified about that are going to be contradicted by defendants, and if so what are they?

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Mr. O'Farrell: Counsel for defendant Amherst does not intend to contradict anything that Mr. Riggall said. • • •

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[fol. 180] Mr. Love: I don't know that we will have any contradiction of anything that was said there.

• • • • • • •

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?
A. Harold L. McCormick.
Q. Where do you live, Mr. McCormick?
A. 13 Tinkersville Drive.
Q. Is that in the Town of Port Amherst?

[fol. 181] A. Yes, sir.

Q. What is your age?

A. Twenty-seven.

Q. By whom are you employed?

A. Amherst Barge Company.

Q. How long have you been employed there?

A. About twenty-two months.

Q. You were employed there on the 5th of October, 1955, when Mr. Goett met his death by drowning, were you not?

A. Yes, sir.

Q. Where was Mr. Goett when you noticed him, first noticed him before he went overboard?

A. When I turned the machine on he was about a quarter way down on the barge and about the center of the barge.

The Court: Will you mark that out, please, on that diagram?

Mr. Pauley: I have a picture here he can mark it on, your honor.

Q. This diagram here, I will explain it to you. This is the shore line here. This is the digger boat and this is the large rectangular area of the barge. Will you mark in chalk there on the barge where you last saw Mr. Goett?

A. Approximately the same place as Mr. Riggall. (Indi-
[fol. 182] cating on blackboard.)

Q. About a quarter way on the barge?

A. A quarter way on the barge, yes, sir.

Q. And you recognize that to be the barge, do you? (Handing photograph to the witness.) Does that look like the barge?

A. It is similar.

Q. Will you mark an X on the barge here?

A. He was near this end, approximately right here.

Q. About—

Mr. Love: May I inquire what the last question was? We couldn't hear it.

Mr. Pauley: I asked him to mark in pen on the barge where he last saw Mr. Goett, the general position, and he made an X about a quarter of the way back on the barge at the second cleat.

Q. The digger boat, where was it located with reference to the X you have placed on that picture?

A. It was on this end of the barge.

Mr. Love: Indicating the opposite end.

Q. The opposite end of the barge. Is that correct?

A. Yes, sir.

Mr. Pauley: All right.

[fol. 183] Mr. Johnson: And by that you mean opposite the place that you had marked the X?

The Witness: Yes, sir.

By Mr. Pauley:

Q. Now, what was he doing at the time you saw him?

A. I just turned the machine on and he was starting to sandblast.

Q. You turned the sandblasting machine on?

A. Yes, sir.

Q. Then what did you observe, if anything?

A. I turned my back so I wouldn't get hit with the sand and walked down the barge so I wouldn't get hit in the face with it.

Q. Then what did you observe, if anything, after that with reference to Mr. Goett?

A. Well, I looked backward. They were just starting to sandblast. I turned my back on them because the sand flies and later I heard the nozzle hitting the bulkhead and I looked around and didn't see him and knew he was in the river.

Q. What did you do after that?

A. Went in after him.

* * * * * * *

[fol. 184] By Mr. Pauley:

Q. Now, Mr. McCormick, did you know where any lifesaving equipment was located on or close to that boat?

A. No, sir.

Q. Had the company ever given you any lifesaving drills while you were working on that boat?

A. No, sir.

Q. Or any other barge you worked on there?

A. No, sir.

Mr. Love: When you say company you mean the Amherst Barge Company?

Mr. Pauley: The Amherst Barge Company, yes, sir.

* * * * * * *

[fol. 185] Q. Did you know of the presence of any life jackets there available for you, we will say, as a worker?

A. I knew there were life jackets in the supply house, yes, sir.

Q. Had anyone given you any instruction with reference to the use of those jackets?

A. No, sir.

Q. What was your understanding about those jackets with reference to who was to use them?

A. As far as I knew they were for everybody, but mostly they came off of the boats.

Q. When you say boats do you mean the barges or the movable boats?

A. Towboats.

* * * * * * *

[fol. 186] Robert A. Goodwin called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak up loud.

The Witness: Robert A. Goodwin.

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?

A. Robert A. Goodwin.

Q. Mr. Goodwin, where do you work?

A. Amherst Barge Company.

Q. How long have you worked there?

A. Nine months one time and three months another time.

Q. What is your occupation?

A. Painter, spray painter.

Q. You were aboard the Carbide barge, weren't you, when Mr. Goett drowned?

A. Yes, sir.

Q. Where did you last see Mr. Goett on that barge before he went overboard?

A. When I looked up at him he was near the edge of the barge on the inside of the kevel.

[fol. 187] Q. All right. Will you mark it on this chart here, this drawing? This is the barge here, facing up the river. Here is the digger boat. This is next to shore, next to the river.

Mr. Love: How about taking us in on the conversation? We would like to hear it.

Q. You see this small rectangular area here? That is the digger boat. You remember that boat, don't you?

A. Yes, sir.

Q. Now, in front of it or facing up the river according to this diagram is a long rectangular area. I traced it here with chalk. That is the barge. The line right beside the rectangular area is the shore line. This area over here to your left represents the river. Where did you see Mr. Goett?

A. Outside.

Q. When you say outside, next to the river side? Is that right?

A. River side, yes, sir.

Q. About how far was he from the edge of the barge?

A. I don't know what to figure the kevels, the distance they are in.

Q. When you speak of kevel, I will show you this picture here and ask you to point out a kevel to me.

A. All these here.

[fol. 188] Q. I will ask you to mark a circle around a kevel.

The Court: Wait a minute. You get so many markings on there. Let him put a circle where he saw Goett. Then you will kill two birds with one stone.

Mr. Pauley: All right, sir.

Mr. O'Farrell: Your honor, I might interject, you have one circle where the last man saw him. Wouldn't it be better to have this man put his initials?

Mr. Pauley: It was an X the last time.

Q. The digger b[illegible]t is on this end of the barge here opposite the X here and--

A. This blaster set over here and this straight across would run—that would be about middle ways where I saw him. It looked like this was blasted out around here, had been, and he was coming back.

Q. Just put your mark where you last saw him.

A. Well—

The Court: Mark a circle.

Q. Make a circle.

A. Around here. (Indicating on photograph.)

Q. What was he doing at the time you saw him?

A. Well, at the time when I looked up at him I was blowing sand back towards the lower—down the river space, [fol. 189] blowing it off of the surface for painting, and when I looked up at him he was sandblasting and it seemed like it was—oh, it might be a minute or minute and a half before I looked up again. Then when I looked up again I missed him.

Q. And he was overboard, was he?

A. Yes.

Q. What was your occupation with Amherst Fuel Company?

A. Painter, spray painter.

Q. Had you worked on any barges previous to that time?

A. Yes, we had been painting numbers on it was about the only thing, no major job.

Q. Did you have any knowledge of the presence of any life jackets available for your use?

A. Not at the time I didn't because I just never used them and wasn't required then.

Q. Do they require you to use them now?

A. Yes, sir.

Q. At the time of Mr. Goett's drowning was there a stanchion line around that barge?

A. At the time?

Q. Yes.

A. No, sir.

Q. Was there ever one put around the barge afterwards? [fol. 190] A. Yes, after it was taken out of the water, there was.

The Court: What is a stanchion line?

The Witness: It is a rope put around to keep you from falling over, goes around the end and the sides.

The Court: Is this stanchion line above the floor surface of the barge or is it below?

The Witness: It is above. I believe it is something like three feet, four feet.

The Court: It just answers the same purpose that a railing would, does it?

The Witness: Yes, sir.

The Court: All right.

By Mr. Pauley:

Q. How long after Mr. Goett's death was it that the stanchion line was put around the barge, if you remember?

A. I don't recall whether it was the same day or the day after that.

Q. What attempt, if any, did you make to rescue Mr. Goett?

A. Well, the only thing I could find on the barge—

Q. Can you talk a little louder, please?

A. The only thing I could find on the barge at the time he was overboard was the sandblasting hose and a half inch hose which I was using myself to blow the sand back [fol. 191] with, and I throwed my hose over and it wouldn't reach and I think the sandblasting hose was on. We got it cut off.

Q. Would the sandblasting line reach?

A. No.

Cross examination.

By Mr. Johnson:

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Q. You have marked on this picture, which is identified as the Plaintiff's Exhibit Number 1 a circle which shows [fol. 192] where you last saw Mr. Goett at work.

A. Yes, sir.

Q. And that was, I believe you said, approximately one minute before you looked up and noticed that he was overboard.

A. Yes, sir.

Q. At the time you saw him where you have marked the circle on the barge he was facing inboard towards the center of the barge with his back to the river, wasn't he?

A. Uh huh, yes.

Q. And he was at that time working or moving slowly backwards with the hose of the sandblaster in his hand?

A. Yes, sir.

• • • • • • •

By Mr. Johnson:

Q. Mr. Goodwin, did I understand you to say that you did not know on the day that Mr. Goett was drowned that there were life jackets available to you and to him and [fol. 193] to other employes in the supply house if you wanted one?

Mr. Goldstein: Objection, if your honor please. If Mr. Johnson wants to ask whether or not Mr. Goodwin knew as to himself, that's perfectly all right, but I certainly don't think he can ask whether it was known to Mr. Goett or anybody else.

The Court: I don't think he has asked that.

Mr. Goldstein: I am sorry, then. I misunderstood the question.

The Court: He said available to this man or the others.

Q. Is that your testimony?

A. Well, ask it again.

Mr. Johnson: Would you read the question, please?

(The pending question was read.)

A. I don't think I did, no.

Q. Do you recall when the Coast Guard officer investigated this case that you were asked this question, "To your knowledge can life jackets be checked out of the storeroom and to your knowledge has anyone ever been refused a life jacket that applied for one?"

Mr. Pauley: Excuse me, Mr. Johnson. What page?

Mr. Johnson: Page 20 and 21, Coast Guard Report.

Mr. Pauley: What was your first statement to him, [fol. 194] please?

Mr. Johnson: Read the question as far as I got with it.

(The pending question was read.)

Q. And didn't you answer that question as follows, "As I say, I think they are available and I never heard of anyone being refused one."

A. Yes, I think I did answer that that way, but he was asking questions so fast that I think that I kind of overlooked it, but the thing—what brought to my mind when I answered it was if they was doing that type of work they was doing, I thought they should have it. I really didn't know that they didn't have them then. In fact, I wasn't around the supply room back then to know a whole lot to start in on a place to work.

Q. I am not sure I understand your answer, Mr. Goodwin, but it is a fact that you did make that statement in answer to that question before the Coast Guard investigator?

A. Yes, it is.

. . . . . .

[fol. 195] Mr. Pauley: I recognize that fact, but I think—

The Court: He has made his explanation, I believe.

Mr. Pauley: Did you know at any time that life preservers were available before you got on that boat with Mr. Goett?

The Witness: That's before the drowning?

Mr. Pauley: Yes, sir.

The Witness: No, I didn't know.

Mr. Pauley: I have one more question, if your honor please.

Did you have any knowledge of a ring buoy being on the digger boat?

The Witness: No, sir.

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[fol. 196] THOMAS L. HAMMONS called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak up.

The Witness: Thomas L. Hammons.

Direct examination.

By Mr. Pauley:

Q. Where do you live, Mr. Hammons?

A. Rand, West Virginia.

Q. By whom are you employed?

A. Amherst Barge Company.

Q. Were you employed by Amherst Barge Company on October the 5th, 1955?

A. Yes, sir.

Q. You recall Mr. Goett was drowned there on that day, do you not?

A. Yes, sir.

Q. When did you see Mr. Goett just before he was drowned? Where was he?

A. You mean while he was on the sandblasting?

[fol. 197] Q. Yes, sir.

A. Well, he was about seven foot from the kevel.

Q. The kevel on which end of the barge?

A. It was on the upper end of the barge.

Q. And when you say the upper end of the barge you mean the end opposite the digger boat. Is that correct?

A. Yes, sir.

Q. And that was about how many feet from the front end of the barge?

A. I couldn't say right off. It was about a quarter way back from the head end of the barge.

Q. And how close was he to the river side of the barge, the side that was bordering on the river?

A. Well, he was about eight foot from the river side when I last saw him.

Q. When did you next see him?

A. I didn't see him till he was in the water when he was going down.

Q. Were you familiar with any lifesaving equipment that was located on that boat or elsewhere?

A. No, sir.

Q. Had you been told about the existence of any ring buoy or line or life preservers?

[fol. 198] A. No, sir.

Q. What about life jackets. Did you know about the existence of life jackets?

A. Well, I didn't know of any. They could have had them in the supply house, but I didn't know of any.

Q. You were never told about them, were you?

A. No, sir.

Q. Was there a stanchion line around that barge or line around the edge of that barge?

A. No, sir.

Q. Was there ever one placed around there to your knowledge?

A. Yes, sir.

Q. When was that?

A. After the barge was pulled on the ways.

Q. And that was after the death of Mr. Goett?

A. Yes, sir.

Q. When were you first directed to use your life jackets while you were working on the boats up there?

A. Well, sir, I don't work on the river all the time. I don't remember when it was.

Q. Have you ever been directed to use life jackets since the death of Mr. Goett?

[fol. 199] A. Yes, sir.

Q. When was that?

The Court: He said he didn't remember.

Q. Sir?
A. I don't remember.

The Court: He says he didn't remember.

Q. Was that after or before the death of Mr. Goett?
A. After.

* * * * * * * *

[fol. 200] Homer A. Schultz called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Homer A. Schultz.

[fol. 201] Direct examination.

By Mr. Pauley:

Q. Mr. Schultz, what is your age?
A. What is my rate?
Q. Your age.
A. Thirty-nine.
Q. Where are you employed now?
A. Goodrich Gulf Chemicals.
Q. What is your occupation?
A. Welder.
Q. Were you employed by the Amherst Fuel Company on October 5th, 1955?
A. Yes, sir.
Q. Do you recall the drowning of Marvin Goett?
A. Yes, sir.
Q. Were you on the barge at the time that he fell in the river?
A. Yes, sir.
Q. Were you given any instructions or did you know of any safety equipment available on that barge at the time he drowned?
A. No.
Q. Were you ever given any instructions relative to any [fol. 202] safety equipment?
A. No.

Q. Did you know or were you ever instructed concerning any life preservers?

A. No.

Q. Did you know about a life ring on the digger boat located there?

A. Yes.

Q. Did you attempt any rescue of Mr. Goett on your own part?

A. Yes, I jumped in and tried to rescue him. I didn't succeed.

Q. You didn't obtain the equipment, then, from the digger boat, did you, the life ring?

A. No, sir.

Q. Can you explain why you didn't do that, Mr. Schultz?

A. Well, a life ring wouldn't have done me any good. I wasn't sure I saw Mr. Goett. He had done gone under and I wasn't even sure that I saw him, but Riggall and McCormick pointed to where he went down and I tried to get him out of the water after he sank, so a life ring wouldn't have helped me any in rescue operations.

Q. Then you weren't a part of the rescue at all, were you? [fol. 203] You were diving after him after he had gone down.

A. Well, I thought that I could see the body under the water, but I couldn't be sure.

Q. Did you have any instructions at all concerning any life jackets that were available to you to work?

A. No.

Q. Were they made available for you after the drowning of Mr. Goett?

A. Yes.

Q. Do you have any knowledge of whether or not there was a stanchion line placed around that barge while it was in the water on the date of his death?

A. While it was in the water?

Q. Yes, sir.

A. No.

Q. Was there a stanchion line later placed around it after his death?

A. Yes.

Q. How long was Mr. Goett in the water before you recovered the body, to the best of your knowledge?

A. Well, an estimate would be twenty, twenty-five minutes; I don't know.

Q. And how long, if you know, was he in the water before [fol. 204] he went under?

A. I don't know.

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COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Goldstein: If your honor please, at this time I would like to read certain answers to interrogatories both by Union Carbide and Carbon Corporation and by Amherst Barge Company. There seem to be some discrepancies in the answers given to us by both companies and I should like to place that before your honor for your honor's surveillance.

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[fol. 205]

MOTION TO EXCLUDE THE ANSWER OF AMHERST ETC. AND OVERRULING THEREOF

Mr. Love: Before that's done, if your honor please, I would like to move the court to exclude so much of the answer made by Amherst to the question number twelve that is not responsive to the question.

Specifically Amherst was asked, "State the date and time of day that the CC-204 was inspected by the Amherst Barge Company and the name and capacity of the party who inspected the vessel."

The answer goes further than the question in that it brings in an independent inspector and also refers to one of the employes of Carbide and Carbon, which is not responsive to the question. That is one of the discrepancies he is talking about.

Mr. Goldstein: It sure is.

Mr. Johnson: Mr. Love's point may be well taken. We have no objection to any part of our answer to that ques- [fol. 206] tion going out if it is deemed not responsive to

the question, I think we amplified our answer more than that.

Mr. Goldstein: At this time, if your honor please, I do have objection to any part of that answer going out. We have given them a question. They gave us an answer, and whether or not it is responsive should certainly be up to us, the answer to our question, as to whether or not we want to have it stricken.

The Court: I will overrule the motion to strike the answer and hear Mr. Goldstein as to what the questions and answers are, if those questions and answers are material to my decision on any of the issues.

Mr. Goldstein: I think I can make it simple, sir. Very plainly speaking, all I did was ask each of the companies who their men were aboard the barge and when their men were aboard the barge for the first time after the barge was turned over by Union Carbide to Amherst.

In the Union Carbide answers to interrogatories, which we received first since they were served first, their answer to that question is that, "Fred C. Pritchard, . . . Maintenance Engineer for Barges. Duties, Supervisor of Barge Maintenance under Works Engineering Department, and in conjunction with Traffic Department of defendant. During the period of repair at Amherst Mr. Pritchard was not at [fol. 207] Amherst Docks until after death of Mr. Goett. On October 7, 1955, Mr. Pritchard inspected the vessel on marine ways and ordered additional minor repairs, not related to the sandblasting" operation.

In the answer served upon the plaintiff by Amherst, and in answer to the question that was presented to your honor by Mr. Johnson, they stated "On October 2d, at 10:30 a.m., Rex Buckley, an independent inspector, made a gas examination of the barge and rendered a gas free certificate, for which services he was paid by Amherst. On October 3rd, Frederick P. Martin, Amherst's superintendent of maintenance, went on board the barge in company with Mr. Fred Pritchard of Carbide, and examined the barge and discussed the work to be done on the barge."

In other words, Union Carbide said that their man did not go on the vessel until the 7th, two days after Mr. Goett's death. Amherst said Carbide's man went with their man

two days before. We would like to have that matter clarified, sir.

The Court: All right.

* * * * * * *

[fol. 210] Frederick C. Pritchard called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Frederick C. Pritchard.

Direct examination.

By Mr. Goldstein:

Q. Mr. Pritchard, you have the title of Maintenance Engineer for Barges, Supervisor of Barge Maintenance under Works Engineering Department?

A. Yes.

Q. And you are employed by Union Carbide. Is that right?

A. That's right.

[fol. 211] Q. How long have you been employed by them?

A. Since September of 1946, not in that capacity.

Q. When were you employed for the first time in that particular capacity?

A. I believe sometime in 1949.

Q. And you have done that work constantly for them since that time?

A. Yes.

Q. And exactly what does that work entail? Can you tell us that?

A. At times when barges are dry-docked or pulled out of the water I usually make inspections and specify repair work to be done and then we follow—after the work has been completed I also make inspections to see that that work has been done as specified.

Q. And that's for the purpose of making certain that contract agreements have been lived up to. Is that right?

A. Yes. I also make those inspections at times damages have been reported or defects reported.

Q. At any time in October of 1955 were you aboard the CC-204?

A. Yes.

Q. And that is the barge owned and operated by Union [fol. 212] Carbide. Is that right?

A. Yes.

Q. When you went aboard that vessel for the first time was there any lifesaving equipment aboard her?

A. I don't recall any. I don't believe there was.

Q. Was there any lifeline around the vessel at that time?

A. During the day that I was there—I am not sure whether—

Mr. Love: These questions go to a certain day?

Mr. Goldstein: Not yet. I simply asked him the first time.

Mr. Love: You asked him the first time he went aboard her?

Mr. Goldstein: That's right, in October 1955.

Mr. Love: The first time he went aboard in October 1955?

Mr. Goldstein: That's right.

A. The day that I recall being aboard the vessel in October '55, there was a stanchion line—I don't recall whether that was in the process of being applied to the barge or whether it was actually in place, but there was one there by the time I left the barge.

Q. And where was the barge at that time?

[fol. 213] A. It was on the marine ways at Amherst Barge Company.

Q. And that is the very first time you were on that barge in October of 1955?

A. To the best of my memory, that's correct.

Q. That date was what?

A. October 7.

Q. Pursuant to the instructions or within your knowledge were any other employes, either of a supervisory capacity or workmen or employes, aboard the CC-204 during October of 1955 before you?

. . . . . .

A. Well, Mr. Buckley, who issued the gas free certificate,

is an employe of Union Carbide, but he was not acting in that capacity at that time. He is the only person I recall.

Q. He was on the 2d of October. Is that right?

A. I am not sure what date he was there.

Q. But in any event he was on before the death of Marvin Goett. Are you sure of that?

A. No, I am not sure. No.

Q. What position does Mr. Buckley have with the Union Carbide?

[fol. 214] A. Well, he works with our equipment safety division. I am not sure—he is an engineer in the equipment safety division of Carbide.

Q. Safety division, did you say?

A. Yes, sir.

Q. Is lifesaving equipment part of the safety division?

A. I don't believe—I believe they have a separate safety division that handles that sort of equipment at Carbide.

Q. That isn't my question. My question is does his job as part of the safety equipment division include the lifesaving equipment aboard the vessel?

A. No.

Q. If you know, is he familiar with lifesaving equipment aboard the vessel as a member of that division?

A. No, I don't believe so. I don't know.

Q. You don't know? He could be?

A. It is possible.

Q. Do you know how long he was aboard that vessel on October 2d?

A. No, I don't.

Q. Do you know the purpose for which he went aboard the vessel?

A. I think he went aboard to issue a gas free certificate [fol. 215] which was required by the Coast Guard prior to doing any repair work that involves flame or any possibility of igniting any flammable mixtures which might be contained in the vessel.

Q. Are you familiar with that procedure?

A. No, I am not.

Mr. Goldstein: That's all.

Cross examination.

By Mr. Love:

Q. Mr. Pritchard, in making the inspection about which you have just testified, did Mr. Rex Buckley act as an employe of Carbide or as a certificated inspector for the Coast Guard?

A. As a certificated inspector for the Coast Guard.

Q. And he makes such inspections for all companies on the river that require his services and who pay him therefor?

A. Yes.

Mr. Love: Thank you.

Redirect examination.

By Mr. Goldstein:

Q. But he was an employe of Union Carbide at that time. Is that right?

A. Yes.

Cross examination.

Mr. Love: If I may finish—

Mr. Goldstein: I am sorry. I didn't realize you weren't [fol. 216] finished.

Mr. Love: Was Mr. Rex Buckley an employe of Carbide when he made that inspection at that time? Who was he working for?

The Witness: At that time he was working for himself.

Mr. Love: But he is an employe of Union Carbide?

The Witness: That's correct.

Mr. Love: That's all.

The Court: I think I would like to find out whether Mr. Pritchard is just stating his conclusions about these matters or stating facts. Was he on a salary at that time?

The Witness: Well, you mean in connection with this work?

The Court: Was he on a salary at Carbide?

The Witness: Yes, I think so, but not in connection with this particular work.

The Court: Was there any hiatus in the payment of his salary?

The Witness: I am not sure I understand.

The Court: I mean did you deduct something from his salary for some other work that he did other than for Carbide?

The Witness: No, I don't think so.

The Court: Well, did he charge a fee in addition to [fol. 217] his salary and collect that fee from the other parties?

The Witness: Yes, he did that.

The Court: That was permitted by the employer?

The Witness: That's correct.

The Court: All right.

Redirect examination (continued).

By Mr. Goldstein:

Q. Am I then correct in saying that this freedom of time to do work for other people was part of his contract with Union Carbide?

A. I am not sure whether it was part of his contract, but that is practiced.

Q. That was his practice?

A. Yes.

Q. And that was permitted to him by Union Carbide. Is that correct?

A. I am not sure about that. I think possibly, but I don't know the circumstances of that agreement.

* * * * * * *

[fol. 219] Frederick P. Martin called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Frederick P. Martin.

Direct examination.

By Mr. Goldstein:

Q. Mr. Martin, you are employed as superintendent of maintenance for Amherst Barge?

A. That is correct.

Q. And how long have you been so employed?

A. A total for the two companies approximately twenty-three years.

Q. When you say the two companies, you mean—

A. Hatfield Campbell's Creek Coal Company and Am-[fol. 220] herst Barge Company.

Q. Amherst Barge is the successor in interest?

A. That's right.

Q. How long have you worked for them in the capacity of superintendent of maintenance?

A. Approximately six—at the time of this accident?

Q. No, right now.

A. Going on seven years, between six and a half and seven.

Q. What are your duties as superintendent of maintenance?

A. That takes in quite a territory. In other words, supervisory and designing and general mechanics.

Q. Well, do you go aboard the vessel to inspect the vessel?

A. Everywhere, yes.

Q. And in the course of that inspection you would inspect the quantity of lifesaving equipment that might be aboard the vessel?

A. Not necessarily. It would be general work that had to be done on the vessels there, on the different particular jobs that we have to do.

Q. Let me ask you this. If you felt that lifesaving equipment should be used aboard the vessel, do you have the [fol. 221] capacity to order lifesaving equipment put aboard her?

A. At all times.

Q. When was the first time you went aboard barge CC-204 in October of 1955?

A. That was—in other words, the barge was delivered on Saturday. I didn't board it until Monday.

Q. Saturday was the 1st of October?

A. No, that was the 2d, I believe. No, it was the 1st. The 2d, I believe, was Sunday, if I am not mistaken. Just a minute and I will give you that date.

Q. In any event you went aboard—

A. It was on the 2d. I went on the 3d.

Q. You went on the 3d and that is before the death of Marvin Goett?

A. That's right. That was on Monday.

Q. Who went aboard the vessel with you?

A. I went in the presence with Mister—in other words I went on it first, lining out the work. In other words, we were preparing to get ready for the work. Mr. Pritchard always comes up and we go over the barge to line out the necessary work to do to it.

Q. And was Mr. Pritchard with you on October 3d?

A. Yes, sir.

[fol. 222] Q. And that is the man who not more than ten minutes ago stated that he was not aboard the vessel until the 7th?

A. That's correct.

Q. It is quite obvious that one of you is mistaken.

A. I have no proof to back it up other than my statement. That's right.

Q. When you were aboard the barge on the 3d did you inspect her?

A. As to the work to be done, yes, sir.

Q. And did you notice that there was a lack of any lifesaving equipment aboard the vessel?

A. That I hadn't taken into consideration.

Q. You didn't take it into consideration?

A. No, sir.

Q. But that is within your scope of duty?

A. Well, we did have the life ring close there, yes.

Q. When you say close, where was it?

A. That was on the digger boat.

Q. And you looked around and saw there was none on the barge?

A. That I didn't check. In other words, I knew there wasn't on the barge, but I didn't check the lifesaving equipment.

The Court: I think you were asked whether it was with-[fol. 223] in the scope of your duties to determine whether there was sufficient lifesaving equipment on the barge. Did you answer that?

The Witness: I would say partially, yes.

Q. And it would be up to you as well as anybody within your line of rank in the company to order lifesaving equipment aboard the barge?

A. That's right.

Q. We are not now talking about lifesaving equipment to be given to the men to wear. We are simply talking about lifesaving equipment to be stationed aboard the barge, and that would be within your scope of duty?

A. A barge usually never carries lifesaving equipment.

Mr. Goldstein: If your honor please, I move to strike that answer as unresponsive.

The Court: I will sustain the motion. You are asked whether it was within the scope of your duty to determine whether or not lifesaving equipment was needed and, if so, to furnish it.

The Witness: That's right, yes.

Q. And you saw the barge without any lifesaving equipment at that time. Is that so?

A. Yes.

* * * * * * *

[fol. 225] Cross examination.

By Mr. Love:

Q. Mr. Martin, do you know at whose request Mr. Rex Buckley made the gas inspection of this barge?

A. I didn't understand you, sir.

Mr. Love: Would you read it to him?

(The pending question was read.)

A. That was through the Amherst Barge Company through Mr. Barickman, who made contact by phone for the gas free certificate.

[fol. 226] Q. And do you know who paid for that?
A. The Amherst Barge Company.
Q. And do you know what day that inspection was made?
A. That was made on Sunday, October the 2d, 1955.

* * * * * * * *

[fol. 227] ELLEN GOETT the plaintiff, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Ellen Goett.

* * * * * * *

[fol. 241] Cross examination.

By Mr. O'Farrell:

Q. Mrs. Goett, has anyone ever advised you that you were entitled to receive money on behalf of yourself and your daughter for benefits in the nature of compensation?

Mr. Goldstein: If your honor please, I object to any line of questioning concerning Longshoremen's and Harbor Workers' compensation. That is not in this case. We are not suing Amherst Barge and that is certainly not a valid defense as against the plaintiff in this case.
[fol. 242] The Court: In view of the questions about support, I overrule your objection.

A. You mean have I ever been contacted regarding compensation?
Q. Yes.
A. I received some forms through the mail to fill out.
Q. And did you ever fill them out?
A. Yes, sir.
Q. Did you ever attempt to get Longshoremen's and Harbor Workers' Compensation benefits?

Mr. Goldstein: If your honor please, I object to that question. Mrs. Goett is under the advice of counsel and counsel has advised her not to take that claim up at this time. We have filed an election to sue a third-party and the claim for compensation is being stayed. As such, I feel that it would serve no other purpose—

The Court: She could answer this question, I take it, if permitted and I do permit it. Overrule objection.

Mr. Goldstein: Thank you, sir.

The Witness: What is the question?

Mr. O'Farrell: Read the question back, please.

(The pending question was read.)

A. The papers that I recall receiving were West Vir-
[fol. 243] ginia compensation papers, as best I recall, and I filled them out and they are on file with Mr. Pauley.

Mr. Goldstein: If your honor please, I move at this time to strike that entire question because the answer in this particular case obviously shows that West Virginia compensation laws are not applicable to this case.

Mr. Love: There is no such thing in this record, if your honor please. I object to that statement.

The Court: I will overrule objection.

Mr. Goldstein: Thank you, sir.

By Mr. O'Farrell:

Q. Now, Mrs. Goett, I ask you again has anyone ever advised you when your husband died that you and your daughter were entitled to workmen's compensation benefits under the Longshoremen's and Harbor Workers' Act?

A. No, sir.

Q. And that you could be drawing them right now without prejudice to this lawsuit?

A. No, sir, I didn't know there was such a thing.

Q. Nobody has told you that. Is that right?

A. I don't know what you are talking about.

Mr. Goldstein: I am sorry to interrupt. May I have that last question? Will you wait a moment, please, Mrs. Goett? Can you read that last question of Mr. O'Farrell?

[fol. 244] (The last three questions and answers were read.)

Mr. Goldstein: If your honor please, that is an incorrect statement of law and I ask your honor to disregard that. I think your honor well knows that the minute that Mrs.

Goett accepts that compensation award she is forever barred from proceeding in this lawsuit.

Mr. O'Farrell: Your honor, that isn't the law at all. I don't purport to be an admiralty lawyer, but I know that isn't the law.

The Court: The question, while it may have purported to state the law, was not framed in any such form. He just asked whether that information had been given to her by anybody and she said it had not.

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[fol. 251]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

No. 1755

[Title omitted]

Transcript of Proceedings—May 14, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 14th day of May, 1957.

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[fol. 265] HAROLD McCORMICK recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

• • • • • • • •

[fol. 268] By Mr. Pauley:

Q. Can you estimate at this time how long Mr. Goett was in the water in the state that you found him when you [fol. 269] jumped in after him?

A. You mean before he went under?

Q. Yes, before he went under.

A. I would say between ten and fifteen and twenty minutes.

• • • • • • • •

[fol. 270] Cross examination.

By Mr. Johnson:

Q. Mr. McCormick, do I understand that you now say from the time you went into the water until Mr. Goett went under the water, that there was a period of ten to fifteen or twenty minutes?

A. That's an estimate, yes, sir.

[fol. 271] Q. How long was Mr. Goett under the water before his body was brought to the surface?

A. That I don't know, sir.

Q. Do you have any estimate?

A. Maybe fifteen minutes.

Q. You were there during all that time?

A. Yes, sir.

Q. Do you recall that when you testified before the Coast Guard investigator with respect to this matter you were asked this question: "How long was Goett in the water from the time he fell and the body was recovered?" and your answer was, "I can't say. I don't know what time he fell in but I think it was not more than eleven or thirteen minutes in the water."

A. That's what I was told.

Q. Wasn't that the answer that you made?

A. Yes, sir.

Q. Now you say that he was ten, fifteen or twenty minutes on the surface of the water and that he was approximately fifteen minutes underneath the water before he was retrieved?

A. Yes, sir.

Q. Is that what you now say?

A. Yes, sir.

[fol. 272] Q. Where was he when you first discovered him in the water?

A. He was about five foot out from the barge, sir.

Q. And what was he doing?

A. Fighting to keep hisself on top.

Q. Did you jump in immediately?

A. Yes, sir.

Q. How long was it before you got hold of him?

A. Almost immediately, sir.

Q. Then what happened?

A. I swam with him to the edge of the barge.

Q. How long did that take?

A. I couldn't say, sir.

Q. Did it take very long?

A. It seemed like a long time, yes, sir.

Q. How long did you have hold of him?

A. I couldn't say that either, sir.

Q. You have no idea?

A. No, sir.

Q. Was he fighting and struggling with you all the time you were in the water?

A. Yes, sir.

Q. And that went on for ten, fifteen or twenty minutes?

[fol. 273] A. Yes, sir.

Q. How long was it before Mr. Riggall came in the water?

A. As soon as I dropped loose from the wearing strip and both of us started under.

Q. How long was that after you first went in?

A. I couldn't say. Truthfully.

Q. Do you have any estimate?

A. I would say ten minutes.

Q. Ten minutes after you went in before Mr. Riggall came in?

A. Yes, sir.

Q. And Mr. Goett was still on the surface of the water at that time?

A. Yes, sir.

Q. Still fighting and struggling?

A. Yes, sir.

Q. How long did he continue to fight and struggle after Mr. Riggall went in the water?

A. I would estimate maybe five minutes.

Q. And you and Mr. Riggall were both trying to rescue him during that time?

A. Yes, sir.

Q. When did Mr. Schultz go in the water?

[fol. 274] A. Just as Mr. Goett went under.

Q. How long would you say that was after you first went in the water?

A. I would say about fifteen minutes.

Q. During this ten, fifteen or twenty minutes how much of the time were you hanging onto the wearing strip on the side of the barge?

A. That I couldn't say.

Q. Do you have any estimate?

A. Three.

Q. Three minutes?

A. Yes, sir.

Q. And the rest of the time you were actually in the water struggling with Mr. Goett?

A. Yes, sir.

• • • • • • •

[fol. 278] FREDERICK MARTIN recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Goldstein:

Q. Mr. Martin, you testified yesterday, I believe, you were in the capacity as a supervisor since 1946 or '47? Was that your testimony, as you recall?

A. No, sir, I said in '50.

Q. In '50?

A. With this company, yes, sir.

Q. In any event, you were with this company since '50 in a supervisory capacity?

[fol. 279] A. Yes, sir.

Q. And, of course, you were with them on or about October 5th—

A. Yes, sir.

Q. —1955. Now, are you familiar with the entire area of Reed, West Virginia, where the Amherst docks are located?

A. That's at Reed.

Q. Reed?

A. That's right.

Q. And you are familiar with the physical contour of the land and you are familiar with the bridge that is there and the bridge pilings?

A. That's right.

Q. And the section of the ways and everything else?

A. Yes, sir.

Q. And you are there every day practically?

A. Every day.

Q. In fact, that is your working area. Is that so?

A. That's right.

Q. When was the bridge built?

A. That bridge was in there before '55. The actual date, I couldn't give you the actual completion or starting date on that.

[fol. 280] Q. But you know, of course, that the bridge was there from the moment you began working for Amherst. It was there, it was a physical structure. Is that right?

A. I was there before the bridge was.

Q. Working for Amherst then?

A. That's right.

Q. Have the marine ways been moved in any manner from 1955 to the present date?

A. No, sir.

Q. There has been no construction at all to the marine ways in the sense of moving them out of their position?

A. In changing the positions, no.

Q. They might have repaired them otherwise?

A. That's right.

Q. But there is no change in position. Have they built any new houses or warehouses or offices since 1955, the date of Mr. Goett's death?

A. They had the main office in construction.

Q. They have it under construction now?

A. No, it is completed now.

Q. But outside of that, all the physical structures are exactly the same?

A. In that area I would say yes.

[fol. 281] Q. In that area. There are some vessels generally docked in the river. I believe one of them is the Herbert Jones, and there are some other vessels there.

A. That's right.

Q. Are they now docked in the same place that they were docked in 1955 when they came in?

A. That would be a hard question. In other w rds, they are usually docked in the same mooring. In other words, the harbor. It might not be in the exact position.

Q. It is within a couple of feet, would you say?

A. I wouldn't say a couple of feet.

Q. How close would you say they are?

A. It changes all the time. The location of the harbor is the same, but the position of the boats in the harbor would change almost every time they come in.

Q. But relatively little. We are talking about a matter of feet now, but generally speaking the harbor area is the same and the mooring is the same and the boats are docked in the same place. Is that correct?

A. Are you speaking in the area of the bridge pier or of the harbor?

Q. No, the harbor. It is in the same general area?

A. That's right.

[fol. 282] Q. Is the digger boat in the same place that it was then?

A. That's right, yes.

Q. And has the digger boat been changed in any manner or means since 1955?

A. Very slight improvements.

Q. Minor repairs?

A. Minor repairs.

Q. But generally speaking, it is the same?

A. It is the same.

Q. What were those repairs?

A. The only difference would be there is the location of the ramp or concrete pier being built to support the ramp a little bit, changed it from steam to diesel. That's the only changes.

Q. When was the change made from steam to diesel?

A. In the last year, I would say, in the last six months.

Q. Where was the ramp?

A. It is gasoline, not diesel. In other words, it is motor driven.

Q. What about the ramp?

A. The position of the ramp is the same. The only thing is the platform where the ramp sits on or tied to the bank has been changed. We have made a concrete pier [fol. 283] there instead of the way it did lay against the bank.

Q. You made a concrete pier?

A. It makes no change whatsoever in the location of the digger. It is a betterment.

Q. What about the ramp? Is the ramp position exactly the same?

A. Yes, exactly the same.

Q. How is that ramp built? Give us that.

A. You want the complete structure?

Q. Yes. What is it made of first?

A. The base of it is steel.

Q. When you say the base, that's the ramp itself?

A. No, the framework is steel. It has wooden pads on it that can be removed in case of high water.

Q. As I understand it, that ramp is a more or less straight section going out over the water. Is that right?

A. It is straight on top of the digger boat, yes.

Q. And it is on top of the digger boat?

A. In other words, it is mounted on the deck.

Q. It is mounted on the deck of the digger boat?

A. That's right.

Q. At the present time?

A. Yes.

[fol. 284] Q. And was it mounted on the deck of the digger boat at that time?

A. Yes.

Q. What is the change now between the ramp now and the ramp then?

A. Just a concrete pier. There is no change other than the guards that were wooden at the time have been replaced with steel pipe.

Q. Where is this concrete pier that we are talking about?

A. It is just at the upper end toward the port side. Considering the upper river end as the head, it is to the port and to the left of the digger boat, which is mounted in this position.

Q. Like this (indicating)?

A. No, here is the head up the river. Considering this is the head, this is the port side. The concrete pier is located in this area.

Q. You are not talking about the part of the digger boat that is below the ramp, are you?

A. I am talking about the ramp as a whole. The ramp crosses the digger boat and is laid over here on the bank. It is mounted on the head end of the digger boat. In other words, it is built as a part of the hull.

[fol. 285] Q. When you say that the ramp is laying or resting on the deck of the digger boat, do you mean—

A. The framework is sitting on it.

Q. The framework is actually sitting on it?

A. That's right.

Q. Are there any vertical beams or foundations from the ramp down to the digger boat?

A. Yes, sir.

Q. And how long are those beams or foundations, beams, whatever you call them?

A. I would say approximately seven foot.

Q. Seven feet, so that the ramp is not actually lying on the digger boat, it is connected to the digger boat with a vertical beam that holds the ramp up?

A. Actually the rigs are approximately between, I would say, around six foot. Then you have a fifteen inch I beam on top of that plus your wooden ramp that is on top of that.

Q. Where are the beams attached to? The top part is attached to the ramp. Where are the bottom parts of the beam attached to?

A. I could draw you a picture a lot easier, but the beams are attached onto the digger boat, then they are attached to the streamers which form a support for the pads.

[fol. 286] Q. You say that is attached to the digger boat? Is that your testimony?

A. That's right.

Q. The part of the digger boat that these beams are attached to, is that afloat?

A. Yes, sir; a part of it, now.

Q. A part of it?

A. A part of it, yes.

Q. A part of it. Can that part that is afloat be separated from the rest of the digger boat that is not afloat?

A. The whole thing can be removed at times if you want it. In other words, it is built so it can be removed in case of high water.

Q. In other words, it is in sections?

A. That's right.

Q. It is in two sections. The digger boat—

A. No, the digger boat is not. The digger boat is in one piece. It is the ramp that is in two sections.

Q. I am talking about the digger boat.

A. The digger boat is in one piece.

Q. The part of the digger boat these beams, the vertical beams are attached to, is that afloat? Is that part of the digger boat afloat in the water?

[fol. 287] A. Yes.

Q. Is the entire digger boat afloat in the water?

A. Yes.

Q. Is any part of the digger boat stationary to the shore?

A. A part of it; I would say the ramp is a part of the digger boat and it is resting on the shore.

Q. Forgetting for the moment the ramp, is any other part of the digger boat attached to the shore?

A. No.

Q. This part of the digger boat that supports the vertical beams leading to the ramp, is that actually attached, is that actually part and parcel of one structure consisting of the entire digger boat, or is that a separate structure attached to the rest of the digger boat?

A. Would you go over that first section there again? I didn't quite get that.

Q. Is the part of the float that supports the vertical structures leading to the ramp part and parcel of the same structure of the entire digger boat, or is that a separate part of the digger boat?

A. The digger boat is the whole thing. In other words, this ramp is set on the digger boat, is mounted as a unit [fol. 288] on the digger boat.

Q. Forgetting for the moment about the ramp, I am talking only of this float that supports the ramp, but let's for the moment forget about the ramp. Is this float attached to the digger boat or do you consider it a part of the digger boat?

A. It is the hull of the digger boat.

Q. It is the hull of the digger boat?

A. It is the hull, that's right.

Q. Could it be separated from the rest of the digger boat, the one part that supports the ramp?

A. No, and stay afloat.

Q. Could it be disattached, could it be separated from the rest of the digger boat, or is this all one structure, the float part of the digger boat?

A. That's right, it is all one structure.

Q. Is it all structurally connected to the digger boat?

A. It is all welded.

Q. And it is part and parcel of one structure?

A. It is one hull.

Q. Is that the same structure that was there in October of 1955?

A. Yes.

[fol. 289] Q. It is all the same. Will you identify or can you identify this picture?

A. That is the complete picture of the harbor and ways of the Amherst Barge Company.

OFFER IN EVIDENCE

Mr. Goldstein: May I offer this?

Mr. Love: Not unless you show it to us.

(Handing picture to counsel for defendants.)

Mr. Goldstein: If your honor please, there is no objection to the marking of this in evidence.

Mr. Love: I can't hear. I am sorry.

The Court: Admitted.

Mr. Goldstein: There is no objection is there?

Mr. Love: Yes, sir, unless we can have a copy of it.

The Court: Admitted in evidence.

Mr. Goldstein: Thank you, sir.

The Clerk: Plaintiff's Exhibit Number 5.

Plaintiff's Exhibit No. 5.

The picture referred to was marked as indicated above and filed in evidence.

Mr. Love: Did your honor admit it?

The Court: There is no question as to its authenticity, is there?

Mr. Love: We know nothing about it at all.

[fol. 290] The Court: I haven't looked at it. Better let me see it.

Mr. Goldstein: I will show it to you in a second, sir, as soon as the clerk finishes marking it.

The Court: What is the objection other than the fact that you were not furnished with a copy?

Mr. Love: I just don't know anything about it at all. We don't have a copy of it, never saw it before. We think we are entitled to a copy of it.

The Court: You should be given a copy of it, but the fact that you don't have a copy would not make it inadmissible in evidence. If there is something about the picture itself that does not correctly show what it purports to show, then it would be objectionable; but if you don't know of any such defect as that, I don't see any reason for not letting it in.

Mr. Johnson: I would like to ask Mr. Goldstein if the picture is being introduced for the purpose of showing the general layout of the Reed dock area or if it is introduced to contradict some part of Mr. Martin's testimony. If it is introduced as a picture of the general dock area, we have no objection to it.

Mr. Goldstein: It is introduced as a picture of the general barge area and not to contradict Mr. Martin's testimony.

[fol. 291] The Court: All right.

Mr. Goldstein: Your honor has seen the picture?

Q. Mr. Martin, can you tell us first the structure, the full structure, the number of beams and the location of the beams leading down from the ramp to the section of the digger boat underneath? First of all how many beams are there?

A. There is eight beams.

Q. And are they all vertical beams?

A. Vertical.

Q. And how far are they placed from each other?

A. In the area there of—in other words, in which way are you speaking?

Q. Well, in relation of one to the other.

A. They are all different sizes. They are all different dimensions.

Q. They are all different dimensions?

A. That's right. They are spaced pretty close equally to support the ramp that we have on there.

Q. Can you tell me the geometric pattern these beams are placed in? Do you understand the question, sir?

A. No, I don't. I don't know what you are trying to get at. I can show you there just about exactly how they are placed.

Q. I would appreciate it. Just draw the top view look- [fol. 292] ing down. I want to get the position of the beams on the digger boat.

A. On the digger boat?

Q. That's right.

A. You are talking of the vertical beams?

Q. That's right, the vertical beams.

A. You want your cross beams?

Q. Yes, please.

A. (Drawing on blackboard.) This is considered as your cross beams. Now, these are tied, the two beams together here. This, then, has a supported beam which comes out and runs this way over top of these. There is another one, and there is two more beams in here which carries the load, over top of those.

This, then, there is a support made up on the ends of these, which is a six inch schedule eighty pipe. Then that goes from here to the bank and this ramp rests on it. This moves here up and down with the rise and fall of the water.

This has—over here is your mounting that this goes on on the ways. This has a seven-eighths line coming to the digger boat here. Also we have a seven-eighths wire line coming in here, one into an anchor here, which makes it a permanent line there unless there is extreme high

water. These are then removed. The back end of the [fol. 293] digger, which is resting against this pier, is also with a line and a large tire in between this and the pier for rubbing purposes.

Q. When you say the pier do you mean the bridge?

A. The bridge pier. On your picture you will notice that that digger boat there is resting against the bridge pier. There is only a tire between it and the bridge pier.

Q. First of all, let's get the dimensions clear—can everybody see this—clear in our minds. How wide is the digger boat at the part of the boat right under the ramp?

A. That is approximately thirty to thirty-two foot.

Q. How wide are each of these vertical beams, the eight vertical beams?

A. You want your vertical beams? They are an eight inch H column.

Q. Eight inch H column?

A. That's right.

Q. So that it is eight inches across from here to here.

A. That's right. It is just schematic of how it is put in. If I was going into detail it would take quite some time to do it.

Q. It is in this shape?

A. That's right. It is an H column.

Q. Is that right?

[fol. 294] A. That's right. It would be square. An H column is square.

Q. But is that the way the H runs? It doesn't run the opposite way? It could run this way? It doesn't, though, does it?

A. No, it runs that way like this one here.

Q. This way, did you say?

A. This way.

Q. This way?

A. On the back side only. These others are pieces in here. We have some pieces in there which is eight inch pipe making support.

Q. Which is the pipe?

A. The center four there.

Q. These four?

A. That's right.

Q. You say they are pipe?

A. Yes.

Q. Are they circular in cross section?

A. Yes.

Q. What is the diameter of those circular pieces?

A. They are—I don't remember whether those are eight inch pipe or whether they are ten, but I believe they are [fol. 295] eight, which would be eight and three-quarters O. D.

Q. Can you estimate the amount of space in between each of these?

A. I couldn't give it to you offhand to be exact. It is equally spaced across the beam. The outer beams are stepped in approximately a foot from the nosing of the barge, of the float.

Q. How close are those outside H beams to the edges of the float?

A. I said about a foot.

Q. About a foot?

A. Yes.

Q. So that you have a foot and then about eight inches and a space another eight inches and a space?

A. No, you wouldn't have it spaced that way. They would be spaced equally across there, which would be in three equal spaces over all.

Q. There would be three equal spaces between this section?

A. Yes.

Q. And in between each space there is either an H beam or pipe?

A. The way I would draw that would be on centers equally spaced all the way across there.

[fol. 296] Q. And you say the entire thing is about—what did you say?

A. Thirty to thirty-two foot wide. That's just offhand. I don't know the exact measurements because they run different in different digger boats that we have.

Q. You made a number of further lines running across the section. What do those lines represent?

A. Those are fifteen inch I beams.

Q. How thick are the I beams?

A. They are different in thickness. In other words, they were not—in other words, we didn't buy it up. It was material we had on hand that we used on that, which is plenty stout for what we use it for. It is plenty strong enough to support anything we want to put on it.

Q. Are they spaced equally?

A. Yes, they are spaced equally.

Q. And how many are there?

A. There are four.

Q. And how high off the digger boat are they?

A. I would say estimating, actually I would say it was around six foot.

Q. Around six feet?

A. Yes, and then your I beams comes on top of that, [fol. 297] which you have got about seven foot to the top of the I beam—

Q. When you say I beams you mean these?

A. No.

Q. You mean these?

A. No. Those are your posts. The I beams, stringers through there, run on top of your posts.

Q. I am not talking about these. Are we talking about the same thing? I want to get clear on that.

A. That's what I want to know.

Q. I am talking about these lines running aboard the ship.

A. That is a down position, looking on it. In other words, from the top of the ramp looking down through it. It is just a schematic or just a sketch of it.

Q. Let me draw the lines I am talking about.

A. Those are fifteen inch I beams.

Q. Those are the I beams you were just talking about. Is that right?

A. Right.

Q. Those I beams are the ones that are six feet above the deck of the digger boat?

A. In other words, the bottom of them is approximately six foot.

[fol. 298] Q. The bottom of them is approximately six feet?

A. That's right.

Q. Then I go over to these lines running from the front of the digger boat to the back. This I assume is the head.

A. This is the head, upstream end, considered the head.

Q. Then we will talk about these lines, the four lines connecting between the vertical posts. How high are they off the deck of the digger boat?

A. They are the same height. These other beams, the two outside ones, run completely through from one end to the other and one side of the digger boat to the other, which is stepped back from each edge.

These others will run from post to post, between the two posts. Then the other beams will sit on a saddle or an angle clip, which makes it a part of a complete unit, which is all bolted and welded.

Q. And it is all the exact same pieces?

A. That's right, within reason.

Q. Within reason. Of course. And it is all six feet?

A. Approximately six feet.

Q. The section aboard ship and the section running from the head of the vessel back?

A. Yes.

[fol. 299] Q. Six feet above the deck of the digger boat?

A. Approximately.

Q. Give or take a few inches. It might be take a few inches, might it?

A. That's right.

Q. Are you familiar with the CC-204 as it docked in October 1955?

A. That's right.

Q. You were aboard the vessel?

A. That's right.

Q. Can you tell us how the CC-204 was moored?

A. Yes, sir.

Q. To the head of the digger boat?

A. We have two bumpings or knees, what you call, here. They have a brace that runs back in here which is a pipe brace, back in here to the hull. There is two of them. CC-204 was moored against these two. Her outboard side was flush with the outside. Any overhang we usually have it on the inside rather than have this here sticking out. This has a kevel.

Q. That's on the barge?

A. That's on the end of the CC-204. This is then brought back to two double bits or timberheads, we call them, on each side.

[fol. 300] Q. They are not welded to the deck?

A. Of the digger boat. The ends are tied into the barge from the kevel on this side to the barge and a kevel on this side here. At times we tie this one into our rubbing or safety guide on our ramp.

Q. You mean from the kevel to the rubbing or safety guide on the ramp?

A. Yes, we can do that at times.

Q. The ramp is the section above the digger boat?

A. Yes.

Q. Did you do it at that time in October 1955?

A. This was tied in here.

Q. Did you have anything running from the kevel on the end of the barge to the digger boat?

A. Not in here, no, because we were carrying material this way off the ramp onto the barge. That's the way we handle it.

Q. What is this here?

A. That's a pipe support that's underneath.

Q. Underneath the deck?

A. Underneath the ramp.

Q. How high above the deck of the digger boat is that?

A. You don't have enough blackboard here.

[fol. 301] Q. I would prefer turning the blackboard around.

A. This is a side view. This shows CC-204 mounted against the head end of the digger boat. This is our ramp. This shows the brace which is on the other side from this, as we call it, the knee. This is a pipe brace welded to the deck. This is permanently welded to the digger boat, which takes up any shock of this boat moving.

This boat was tied in, as you see, with our double bits. This shows how that is mounted. This is the height of the ramp. These are the guards up on the other kevel which can be tied in to this for extra support or just an extra line.

Q. Yesterday I believe you testified there was a ring, a life preserver, aboard the digger boat.

A. Yes, sir.

Q. Where is that life preserver?

A. I cannot show you on this digger boat.

Q. Can you show us on the picture?

A. Yes. This is mounted—

Q. I would appreciate it if you wouldn't write on it, but kindly point it out to the Judge. Will you step forward if you wish, please.

A. If you get a magnifying glass you can also see it. All I have to do is to locate it for you. It is on this leg [fol. 302] right here. Get a magnifying glass and you can see it. It is hanging right there.

Q. Will you point it out to the Judge?

A. Yes, sir, it is right here.

The Court: That is almost midway from the front to the rear.

The Witness: Well, actually, in other words, what we call—this is almost a quarter. What are you looking at there, Judge? Your honor, this is a barge on the outside of the digger boat. This is the standard coal hopper barge. My drawing will show at the end of this ramp, of the end of this—

The Court: That's a little over a third of the way.

The Witness: That's about a third, I would say, at the most.

Q. Am I correct, is it a fair statement to say that the lifesaving ring is past the ramp on the digger boat?

A. On the downriver side.

Q. On the downriver side? It is?

A. That's right.

Q. What is the only way of reaching that lifesaving equipment from the barge? First of all—

A. There is two ways.

Q. All right. May I have both?

[fol. 303] A. This digger boat is most always manned by a man or a digger boat operator. We have a set of steps that comes down here, this set of steps with a handrail.

Q. Where does that lead?

A. To the deck of the digger boat.

Q. From where?

A. From the ramp. That's the only way of getting down here to the digger boat. Most usually there is a man when we are working barges the other side, there is a man on the digger boat at all times.

Q. Do you know if there was a man on that digger boat on October 5th, 1955?

A. Not at the time of the accident.

The Court: You mean there was not or you don't know.

The Witness: As far as I know. In other words, with the work that we had going on, as far as I know we didn't have one on at that time.

Q. What is the second way?

A. Anywhere here if you have a barge alongside here the man could, in other words, go to the barge.

Q. That's from another ship?

A. That's from another boat, floating.

Q. But assuming the absence of any other boat, the only [fol. 304] way to get on that digger boat is by that ladder running from the ramp to the digger boat. Is that correct?

A. That's right. In other words, from here to here. That's the way it is mounted all the time.

The Court: Mr. Martin, you called it a set of steps and counsel called it a ladder.

The Witness: It is not a ladder. A ladder has rungs. This has risers.

The Court: A set of metal steps?

The Witness: Yes.

Mr. Goldstein: I stand corrected.

The Witness: This has your risers to it. In other words, it is a set of steps.

Q. And that leads from the top of the ramp down to the digger boat?

A. From the surface of this ramp down to the digger boat.

Q. How do you get from the barge to the ramp?

A. From this barge?

Q. That's right.

A. Well, you can step across there. This was only about a three or four inch differential between the height of this barge here. We took all of our equipment over here from this ramp.

[fol. 305] Q. How high is the ramp above the water or how high was it on October 5th?

A. It was the same as it is now. I would say in the neighborhood of seven and a half to eight foot.

Q. Seven and a half to eight feet?

A. Yes, sir.

Q. Did you say that the vertical beams are about six feet?

A. That's right. In other words, these are all mounted in here, you see.

Q. And that's six feet.

A. That's right. In other words, here is approximately six feet in here. Then you have fifteen inch beams here and those are set down there. They have pads on these and this is four inches. So you can figure this.

Q. Between seven and a half and eight feet?

A. That's right.

Q. You were on the CC-204. Is that right?

A. That's right.

Q. And the CC-204 where the men were working, that is the center of the barge where they were trying to save Goett was testified to as being approximately nine feet above the water.

A. That's right.

[fol. 306] Q. Agreeing with that figure for the moment—

A. All right. This is six—

Q. I haven't finished my question yet. Agreeing with that figure of nine feet from the middle of the barge for a moment, I notice you have drawn an incline toward the front of the barge. How high is the incline, the total incline from here?

A. That's approximately a foot.

Q. That's approximately a foot?

A. Yes.

Q. So that from this part it would be ten feet—is that correct—from the water?

A. That's correct.

Q. Assuming this is right.

A. It could be a little over that.

Q. It could be ten and a half?

A. Yes.

Q. Do you think it could be eleven?

A. It could be. May I mention one thing here?

Q. Go ahead.

A. You haven't taken into consideration the distance from here to the point on your digger boat.

Q. Oh, I will.

[fol. 307] A. All right, sir.

Q. This entire section was seven and a half to eight feet. Is that what you said?

A. Yes, this is six. This is close to eight feet, yes.

Q. How high is the digger boat from the water?

A. Depending on whether this is loaded or not, this is approximately, I would say, two foot to thirty inches.

Q. Two feet, that would be two and a half feet?

A. That's right, approximately.

Q. It would be just within six inches of a foot, did you say, of being level? Is that right?

A. I beg your pardon?

Q. Is that what you said before, it would be within six inches or a foot of being level?

A. Yes. In other words, this distance here. You had a drop from the top of this to your barge, because the equipment going over, we had to raise it over this and we had to drop it here. You couldn't run it right over there. You had a four to six inch drop.

Q. What equipment did you have? This was from the ramp to the barge?

A. No, the equipment that we were using on there, such as sandblaster and fan, we have a four wheel truck that we [fol. 308] move all this with.

Q. At the time of Goett's death did you have any equipment in that area on the ramp?

A. As I remember, no; not on the ramp here.

Q. How many steps, how many stairs or steps were there in that stairway leading from the ramp down to the digger boat surface or deck?

A. Approximately eleven steps I would say here, but you

have another one here and, of course, a landing. There is around eleven steps.

Q. How far would you estimate the lifesaving equipment would be from the bottom of the stairway?

A. As the crow flies, or how you had to go get it?

Q. As you had to go get it.

A. I would say fifteen foot.

Q. And how wide is the ramp?

A. That is a fourteen foot timber there, which gives you twelve foot inside here.

Q. Is the stairway absolutely flush with the ramp or do you have to go up, down or around to reach it?

A. No, you step over this guard rail here for your first step.

Q. I see.

[fol. 309] A. This is a safety here to keep any equipment from backing off. It is more or less a safety measure.

Q. That's a guard rail you have to step over to get on the stairway?

A. Yes. You have a handrail and you have good support there from your handrail.

Q. And was there a guard railing on this side?

A. No, sir.

Q. Assuming that a man wanted safety equipment and he was approximately 160 feet away from this edge of the barge, in other words, he was down here somewhere, is it your testimony now that in order to get the safety equipment on the digger boat you would have to first run 160 feet; two, jump from the barge to the ramp—

A. He would step.

Q. He would step. It is a foot and a half, you say.

A. No, no. In other words, your first step would be to the top here, then down. In other words, it is just like stepping from this step here down to this. In other words, that guard rail is not so high a man can't step over.

Q. What did you say the thickness of that section in here is?

A. I didn't say.

[fol. 310] Q. What is the thickness?

A. This, I think, is an eight inch H column.

Q. In other words, he would have to step from the barge across an eight inch open space, over here and down?

A. This comes out over this just slightly. In other words, a man wouldn't have to step much over a foot at the most at any time there to get to the center of that.

Q. And would he have to step up or down to get to the ramp?

A. Actually, the man, if you wanted to take it in technical terms, he would have a four inch rise, but a man in a hurry would never hit this. A man would step from here over into the middle. If he was running this 100 foot, he would never touch this.

Q. But he would have to cross the ramp?

A. That's right.

Q. Then he would have to step over the one guard rail?

A. That's right.

Q. Then he would have to go down the stairs?

A. Yes.

Q. Then he would have to go fifteen feet?

A. Yes.

Q. And he would have to take the safety equipment off [fol. 311] the hook or line?

A. That's right.

Q. How was that attached?

A. It was just laying in there. In other words, a man can get it at any time. It is not fastened.

Q. Not fastened in any way? Then he would have to take the safety equipment, the ring, whatever it is—

A. That's right.

Q. —and he would have to hold it, and holding it he would have to run back the fifteen feet?

A. Yes, it would be just the reverse.

Q. He would have to go up the stairs, across the guard railing, across the ramp and then back 160 feet?

A. Yes.

Q. And that's the closest safety equipment that was available on this particular day. Is that right?

A. That's right.

Q. Mr. Martin, will you kindly draw a line from the safety equipment vertically up to where the clouds are shown with an X? I want you to mark a vertical line up

so that we can pinpoint the safety equipment at a later date.

A. I made a mark on there. In the light you can see it.

Mr. Goldstein: May the record show that the X marked [fol. 312] by Mr. Martin is the location of the safety equipment?

Q. Would you consider it cautious and prudent upon any man to attempt to jump in order to avoid going that way that we have just discussed, prudent to jump from the barge down to the deck of the digger boat and run across there?

A. In a case of emergency there is lots of things you might do that might seem foolish otherwise.

Q. It would seem foolish otherwise?

A. Other than this time.

Q. Otherwise?

A. That's right.

* * * * * * *

Q. Mr. Martin, can you mark this picture with a Y showing us the supply house where the life jackets were kept?

A. You want it with a Y?

Q. With a Y.

A. Do you want it lined up?

Q. Yes, please.

* * * * * * *

[fol. 313] The Court: About how far in feet is that from the nearest access point to the CC-204?

The Witness: From the nearest point of that barge is approximately 300 feet, I would say.

* * * * * * *

Cross examination.

By Mr. Johnson:

Q. Mr. Martin, is there at the present time any kind of a float or flat lying forward of the digger boat?

A. There is at this time.

Q. Was there on October 5, 1955?

A. As a unit, no.

Q. All of that flat or float that's lying forward of the digger boat now—

A. At the present time it is a part of digger number two, which we had cut in two on our marine ways some time ago to make a shorter unit.

Q. That was not there?

A. That was not there and, of course, the indication in that picture there, of course, that barge has disclosed that that is there now.

[fol. 314] The Court: Is that at the lower end?

The Witness: That's at the upper end now. It was a part of another piece of equipment.

Q. This picture here, which you have testified with respect to, which is the plaintiff's Number 5, shows in the left hand portion of the picture the digger boat about which you have testified?

A. Yes, sir.

Q. There is a hull of some kind apparently lying outboard of the digger boat. What is that?

A. This is a cabin that was built on the float, as I stated previously, was part of this digger boat Number 2, which we made into a working float, which we have now put against this to give us more area there for workmen. And the other smaller boat that you see in there is the Laura J., which we were working on at the time the picture was taken.

Q. What is the long object lying outboard of the digger boat in that picture?

A. That is a standard coal hopper barge which is 2617511.

The Court: This added float, as you call it, is the thing that you see upriver from the upper edge of the ramp?

The Witness: Yes, sir. As the picture shows, your honor, this is the end of the ramp right here. In other words, [fol. 315] this is the upper end of the digger boat which I have in my sketch over there tried to accomplish. This float, in other words, you could see this building on this float, which was a housing built on the digger boat for a hoisting engine for use when it was one unit.

The Court: At the time of this accident the upper rim of the ramp was the upper part of the digger boat?

The Witness: That's right. In other words—

The Court: Upper edge, I mean.

The Witness: That's right. This is the upper end of the digger boat at the time CC-204 was there.

* * * * * * *

HELEN COLCORD called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.
The Witness: Helen Colcord.

Direct examination.

By Mr. Pauley:

Q. You are Mrs. Helen Colcord, are you not?
A. Yes, sir.
[fol. 316] Q. Where do you live, Mrs. Colcord?
A. Nitro, West Virginia.

Mr. O'Farrell: I can't hear the witness, your honor.
The Witness: Nitro.

Q. Mrs. Colcord, what is your vocation?
A. Housewife.
Q. Do you have any other vocation or avocation?
A. I teach swimming, lifesaving.
Q. Swimming instructor, you say?
A. Yes, volunteer.
Q. I beg your pardon?
A. Volunteer swimming instructor.
Q. How long have you been a swimming instructor?
A. About twenty years.
Q. What phases of swimming or water safety does a swimming instructor deal with?
A. Swimming, lifesaving and water safety.
Q. And when you say water safety, what do you mean by that?
A. Safety around water fronts.
Q. Protection of life around the water?
A. Yes, sir.
Q. Are you connected with any accredited association [fol. 317] on water safety and swimming?
A. American Red Cross.

Q. And what is the extent of their program in this country, if you know?

A. Well, we have had the program in the Red Cross for about the last thirty-five years now, and it is to teach lifesaving and water safety to as many people as we can teach it, and it is accredited through all organizations, any safety organization.

Mr. Love: I am sorry, we can't hear.

The Court: You can talk louder than that. Just raise your voice.

The Witness: I am scared.

The Court: You don't need to be scared.

The Witness: We teach to all safety organizations, and it is accepted by the armed forces and Boy Scouts and Girl Scouts and any other organization that has to do with safety.

Q. You have never been in court before?

A. No.

Q. Just lean back and take a deep breath and take it easy. Nobody is going to bother you. Mrs. Colcord, how many students have you instructed and qualified for water [fol. 318] safety training under the Red Cross program since you have been teaching livesaving?

A. Oh, between five and eight hundred, at least.

Q. Just a little louder, now.

A. I would say between five and eight hundred, at least. I don't have any idea how many.

Q. In the instruction of lifesaving and water safety, are you familiar with the various water safety devices that are used in rescue work?

A. Yes.

Q. Will you name some of them, please?

A. Well, the simplest is just a pole.

Q. A what?

A. Is a bamboo pole or any kind of a pole; that's a simple one, just a plain line. Then we have a heaving line which has a knot in the end of it.

Q. Let me interrupt you there for a moment. You say a plain pole, just an ordinary stick or pole. Is that right?

A. We usually use a bamboo pole, a long one.

Q. How is that used in rescue work?

A. To reach, just hand it to them.

Q. I beg your pardon?

A. Hand it out to the victim, try to put it in the middle-[fol. 319] of their chest where they can grasp it quickly, not over their head or some place.

Q. Assume they are under water and are going down.

A. Well, you can stick it under the water and they will grab it if you hit their body with it around their stomach or their chest, they will grab it.

Q. I think you said another apparatus was a throw line.

A. Just a plain line that can be thrown.

Q. Just a plain manila line?

A. Yes.

Q. Where and how is that used in water safety?

A. Well, someone stands either on the dock or on the beach and just throws it and you hold onto the other end and they can grab it and you can pull them back in safely.

A heaving line will go further because it has a knot in it. You tie a knot in the end of it which weights it and you can throw up to forty or fifty feet with a heaving line. A throw line, you couldn't go much more than twenty or twenty-five feet with just a plain line.

Q. And that throw line is an ordinary rope with a knot on the end of it?

A. Yes.

Q. Are you familiar with any other water safety devices? [fol. 320] A. Ring buoys.

Q. What?

A. The ring buoy.

Q. Will you describe that to us, please?

A. Well, a ring buoy can be either just a plain buoy which weighs about two and a half pounds and about fifteen inches maybe across, filled with cork and covered with canvas, and you can just sometimes have the ring buoy by itself and throw it.

Most of them now have a rope attached, a sixty foot length of rope, which is much better than throwing just the ring buoy, and when you throw it they can grasp it and you can pull them back in with the rope.

Q. Isn't it a fact that there is a rescue known as the swimming rescue?

A. Yes, sir.

Q. Are you familiar with that type of rescue?

A. Very much so.

Q. Will you tell us when and where that type of rescue is used?

A. The swimming rescue should never be attempted unless there is no other way, and then only by an expert lifesaver. We beat that into the kids until we are blue.

[fol. 321] Q. If a person were dressed in working clothes and had boots with steelplated toes on their shoes, what in your opinion is the possibility of that person making a successful swimming rescue if he has had no lifesaving experience.

A. Very little.

Q. I believe you said that throw lines—is that what you call them?

A. A throw line has a knot in the end of it.

Q. And what was the other line?

A. The heaving line.

Q. What?

A. The heavin; line. The throw line is a plain line, any piece of rope you could find around. A heaving line has a knot, we call a monkey fist which you put into the end of it, which gives it weight, and also the victim can grab hold of it and pull themselves in.

Q. I believe you said you find throw lines around docks. Is that right?

A. Almost every one I have seen where I have taught and everything, we have to have them.

. . . . . .

[fol. 323] By Mr. Pauley:

Q. In your opinion, Mrs. Colcord, based on your experience and your study of the subject, are life lines or throw lines attached to docks good water safety practice?

A. Yes, sir.

. . . . . .

Q. How many docks have you seen in your experience as a water safety expert, Mrs. Colcord?

A. Oh, I don't know; probably fifteen, twenty.

Mr. Johnson: What does she mean by a dock?

By Mr. Pauley:

Q. What do you mean by a dock, Mrs. Colcord?

[fol. 324] A. Well, some of the docks I have seen have been just landing docks, landing docks, been up at Nantucket and up on the Cape and down on the east coast and other docks. I am talking about our places where we have taught swimming from regular swimming docks, in other words, specified swimming area.

Q. Mrs. Colcord, assume that the dock is a floating dock 200 feet long and thirty-five feet wide with a flat deck. The distance from the deck to the surface of the water is nine feet, and the dock is moored in deep water. There is no rail around the dock. On the dock people were at work doing jobs such as sandblasting with hoods over their heads or working in the open, and there was no railing around the edge of the dock at all.

In your opinion what would be in that case, based on your experience and your study, the most elementary and efficient water safety installation to preserve life in case a person fell overboard from that dock?

Mr. Love: We object to that, your honor.

Mr. Johnson: We object.

The Court: Talk one at a time and tell me your objection.

[fol. 325] Mr. Johnson: Your honor, we object on the ground that the witness is not qualified to answer the question in the first place so far as has been shown, that the question misdescribes the situation in the second place. It refers to this barge as a dock, and the question does not completely state the facts in evidence in this case.

We think it is an improper hypothetical question. We think the witness has not shown any qualification to answer, and we think, furthermore, it is not a proper subject for expert opinion.

The Court: What is your objection, Mr. Love?

Mr. Love: And in addition to the grounds assigned by Mr. Johnson, in which we join, we have the additional

ground that the Coast Guard, which we presume is the authority on this matter, does not require any such equipment on barges such as is involved in this case.

Mr. Pauley: Your honor, that's on unmanned barges. I am willing to change the word Mr. Johnson said from dock to barge, and as far as the Coast Guard regulations are concerned, these are unmanned barges.

This barge here, when you take into consideration all the facts, it could never unload itself or load itself without being manned, and the pictures that we have used here [fol. 326] in evidence which were furnished us by the defendant show a man wearing a life jacket. I am basing it also, your honor, on the fact that she said she was familiar with the literature and had studied the subject of water safety.

The Court: If she is familiar in any way with regulations applying to the use of barges in this connection, then I will admit her testimony, but merely as a swimming instructor who may have studied the subject of lifesaving, I don't believe that she has shown qualifications to answer this question about the proper equipment for barges.

Mr. Pauley: If your honor please—

The Court: You may ask her further and see whether she is qualified in that field, if you wish.

By Mr. Pauley:

Q. As a swimming instructor, do you also make a study of water safety?

A. Yes.

Q. And what does the subject of water safety pertain to?

A. Lifesaving and safety around bathing places, and around riverfronts and boating places, but by boating places, Mr. Pauley, Mr. Moore, Judge Moore, as far as barges and things and commercial businesses, we have nothing to do with. I know nothing about that part except as far as general safety rules for small craft and things like that.

[fol. 327] Q. Would you be able to express an opinion, say, on a dock area of 200 feet by 30 feet, would you be able to express an opinion upon what you have read and

upon your experience as to what type of lifesaving equipment should be placed on that area?

Mr. Love: Objection.

The Court: You are still talking about docks, Mr. Pauley. I will sustain objection to that question.

* * * * * * * *

[fol. 328] Alva Fultz Applegate called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Alva Fultz Applegate.

Direct examination.

By Mr. Sampliner:

Q. Captain Applegate, keep your voice up so we can hear, all of us can hear back here. What is your address?

A. Vanceburg, Kentucky.

Q. And how old are you?

A. Forty-eight.

Q. What is your profession?

A. Well, I am a master and pilot on the rivers.

Q. How long have you been master and pilot?

A. I have held a master's license since 1947, I believe, '47 or '48.

Q. And on what waters?

A. Waters flowing into the Gulf of Mexico.

[fol. 329] Q. Is there any higher rating on these waters than what you have obtained by passing examination for the United States Coast Guard?

A. Not on steam and motor vessels, no, sir.

Q. Are you a master mariner?

A. Yes, sir.

Q. How long have you been a master mariner?

A. Since 1947 or '48.

Q. When you say a master mariner, what does that mean?

A. That's in charge of all operations of the boat while under way or in the harbor.

Q. When did you first go to sea?

A. In December, I think it was, 1926.

Q. And in what capacity did you go to sea?

A. As a dishwasher.

Q. And after you were a dishwasher in 1926 on these rivers, then what was your next capacity as you sailed?

A. Well, I worked at that I will say four or five months and then went as a deck hand.

Q. And then in your step up what was your next capacity that you signed on these various inland waterway boats?

A. In 1932 I taken the examination for mate of inland steam and motor vessels of all gross tons on the Mississippi [fol. 330] River and tributaries and passed.

Q. What was your next step up the ladder? What did you take, what examination did you take after that?

A. As a first-class pilot.

Q. And did you pass that?

A. Yes, sir.

Q. What year was that?

A. That was in 1943.

Q. And then did you take your master's license after that?

A. In 1947 or '48. I forget just which it is.

Q. As to your experience, will you kindly tell the court how many years you have spent on these rivers?

A. Well, in the neighborhood of twenty-eight or twenty-nine years, between twenty-eight and twenty-nine.

Q. As to your experience, Captain, try to name the companies that you have worked for in those twenty-eight years. By the way, first of all, are you acquainted with the waters around Charleston, West Virginia?

A. Yes, sir.

Q. And you have sailed in these waters?

A. Yes, sir.

Q. Tell us the companies you have worked for during [fol. 331] the last twenty-eight years, to the best of your recollection.

A. Well, I couldn't name them all. I can name you a few of them. United States Steel, Crucible Steel, Dravo Corporation, American Barge Line, Mississippi Valley Barge

Line, Union Barge Line, Keystone Sand and Gravel. I could keep on all day if you want to.

Q. Have you sailed as master for those companies?

A. I have sailed as master for United States Steel and Crucible Steel.

Q. Have you sailed the entire length of the rivers?

A. Yes, sir.

Q. The waters around Charleston, West Virginia, are they navigable?

A. Yes, sir.

Q. Captain, have you been in the courtroom since the inception of this case?

A. Yes, sir.

Q. Have you heard the testimony?

A. Yes, sir.

Q. Now, Captain, are you acquainted with the locale of the Amherst Barge Line Company works?

A. Yes, sir.

Q. Will you tell us, Captain, handing you Plaintiff's [fol. 332] Exhibit Number 5, as to whether or not you have viewed that same view with your own eyes?

A. Yes, sir, I have, both passing on the boat and from the opposing shore.

Q. You say passing on the boats and from the opposite shore. You mean as you piloted in your past experience you have been in these waters?

A. Yes, sir.

Q. Now, have you had an opportunity to observe the drawings that Mr. Martin made here as far as the kevel here and the rake of the vessel here, the freeboard? Do you understand all of these pictures?

A. Yes, sir, I do.

Q. And also as far as the timberheads and bitts? Is that right?

A. Yes, sir.

Q. And do you recognize the drawing that Mr. Johnson made at the inception of this case as he outlined his defense in this case?

A. Yes, I recognize part of it.

Q. All right. Now, Captain, I am going to hand you

Plaintiff's Exhibit Number 1 and I will ask you whether or not you can identify it as to what that vessel is.
[fol. 333] A. That is a loaded tank barge. Who it belongs to I couldn't tell you.

Mr. Love: I can't hear you.

A. That is a loaded tank barge.

Mr. Sampliner: If your honor please, as I understand it, these pictures were turned over to us by one of the respondents here, the Union Carbide. I would like to have these pictures identified. I think they will be admitted by agreement. Is that right, gentlemen? These are the pictures turned over to us.

Mr. O'Farrell: Yes, if we can see them.

Mr. Love: We furnished these pictures to plaintiff. I don't know the time that they were taken.

Mr. Sampliner: That's all right, sir.

Mr. Love: If any of those things become material we would like to reserve the right to so qualify them.

Mr. Sampliner: You did furnish these pictures to us?

Mr. Love: In person.

OFFERS IN EVIDENCE

Mr. Sampliner: Thank you kindly, sir. I would like to have these pictures marked, your honor. They have been turned over to us by the Union Carbide and marked as part of our case, please, and introduced into evidence and ad-
[fol. 334] mitted as such.

The Court: Admitted in evidence.

Mr. Sampliner: Your honor, sir, would you like to look at these pictures?

The Court: Yes.

The Clerk: Plaintiff's Exhibits Numbers 6 to 11, inclusive.

Plaintiff's Exhibits Nos. 6 to 11

The pictures referred to were thereupon marked as indicated above and filed in evidence.

Q. Taking the picture which is marked Plaintiff's Exhibit Number 5, can you differentiate—we have already had the

X marked as far as where the ring buoy is, as far as the digger is concerned, and Y as far as the supply house is concerned by Mr. Martin. Can you take this picture, sir? Would you be kind enough just to differentiate as to the drawing that Mr. Johnson made? In other words, are these ways here, are they adjacent to the landing where the towboats are moored?

A. No, they are not.

Q. Can you tell us, Captain, from your observation what is the distance to the best of your observance and knowledge and estimate from the digger vessel to the supply house? [fol. 335] How far would you say?

A. I would say approximately 500 feet, five to 600 feet.

The Court: I think you should know at that point that the testimony given by Mr. Martin as to the distance of 300 feet represented to the nearest accessible point on the barge, not to the digger boat.

Mr. Sampliner: The distance of this barge, the length over all is what? I believe the fact has been given to the court. It is 195—is that right—195 feet?

Mr. Pauley: 195.

Q. What is your estimate as to the distance from the ramp to the towboats?

The Court: What do you mean by the towboats?

Mr. Sampliner: Towboats that were moored upstream at their landing.

Mr. Johnson: When?

Mr. Sampliner: From the picture.

A. Well, I would say it would be between 800 and a thousand feet or more.

Mr. Love: Pardon me. Do I understand he is making that estimate from looking at the picture?

Mr. Sampliner: Yes, sir. I understand the condition has not been changed since October 5, 1955 and the picture [fol. 336] which was taken yesterday mounted on that plat. and Mr. Martin said there is no physical change.

Mr. Love: We object, your honor. That would involve the angle of the camera and the distance and everything else. If the man has seen the ground and is giving an esti-

mate, that's one thing. If he is making it from the picture, that's another thing.

Q. Did you see the ground yesterday and observe it carefully?

A. Yes, sir.

Q. Are you making it from your own personal observation as well as the picture?

A. Yes, sir.

The Court: I didn't understand there was testimony that these towboats were in the same position. If there was, I didn't hear it.

Q. As to the mooring of those towboats, that is the stationary landing for the towboats, is it not, sir?

A. That's right.

Q. And when you navigated this stream here and came in with your towboat and your load of barges you went to this landing here with your towboat, did you not?

A. I was never in that landing.

[fol. 337] Q. You were never in that landing, but you have been by here?

A. I have been by here, yes, sir.

Q. Is that where the towboats are moored?

A. They lay there, the towboats lay there, and then they have a fleet of empty barges, I believe, below the bridge.

Mr. Love: Would you speak up, please?

A. I said they have the towboats there on the upper side of the bridge and below the bridge they have empty barges tied, I believe, in order to pull up here and load.

The Court: This whole thing, including the digger boat, is on the upper side of the bridge?

The Witness: The upper side, yes, sir.

Q. What do those ways consist of, Captain?

A. They consist of tracks extending out into the water which have cradles mounted on and are operated by winches on the hill to lower and raise the craft out of the water.

Q. Captain, as far as the position of the barge, you have testified as to the distance from the towboat. With the supposition that the vessel in question was moored here, which

was upstream from the digger, how far would you say from the ramp it would be to the ways?

Mr. Love: The question is from the digger to the ways?

[fol. 338] The Court: From the ramp to the ways.

A. By traveling the road?

Q. Yes.

A. The natural way of getting to and from the ways to the ramp?

Q. Yes.

A. I couldn't tell you exactly but my estimate would be at least 600 feet or more.

Q. Captain, whom do you work for?

A. I work for the law firm of Sampliner and Thompson.

Q. And how long have you worked for us?

A. Going on five years.

Q. And during that time you have sailed as master for us?

A. Yes, in 1953.

Q. And you are on salary and you get your expenses?

A. Yes, sir.

Q. And your salary runs every month, does it not?

A. Yes.

* * * * * * *

[fol. 339] The Court: Do you have any interest in this case?

The Witness: None, only to testify as an expert.

The Court: Does that mean that you are giving your services free?

The Witness: I am paid a salary for my services by Mr. Sampliner.

The Court: What are the services?

The Witness: My services consist of investigation of marine disasters, collision, casualties, and taking statements from witnesses and also, if needed, testify.

* * * * * * *

[fol. 340] Q. Now, how many times have you testified for our firm in court in the last five years?

A. Five times.

* * * * * * *

Q. Who else have you testified for?

A. I have testified for Mr. Jim McCardle, James McCardle.

Q. Who else, Captain?

A. I testified here in this court here, I think, about a year ago. Of course, that was for your firm but Mr. Vic Hanson and Mr. Pauley were handling the case here at that time.

Q. Have you done any other testifying in Pittsburgh?

A. Only for Mr. McCardle and Mr. Casteel on a collision [fol. 341] case, and Mr. McCardle's was an injury case.

Q. When you testified as an expert for Mr. Casteel was he representing a shipping concern?

A. No.

Q. Who did he represent?

A. He represented a seaman that was working for the Ohio Barge Line.

Q. Not Mr. McCardle, Mr. Casteel.

A. Mr. Casteel was representing the Smith Towing Company.

Q. And where do they ply out of?

A. Pittsburgh.

Q. Captain, in your opinion what determines whether a vessel is manned or unmanned?

* * * * * * *

The Court: The question is what in his opinion determines whether a vessel is manned or unmanned. I think before we get an opinion, though, we must find out whether he is basing it on the knowledge that he has gained as a master and a pilot.

[fol. 342] Is that right? Would that be the basis of your opinion?

The Witness: Yes, sir.

* * * * * * *

A. I would say that any time that a vessel consists of men operating, loading or unloading, and men are aboard for repair of any kind, that that vessel at that particular time is manned.

* * * * * * *

Mr. O'Farrell: Let me object on behalf of Amherst and move to strike the witness' last answer on the ground that

whether a vessel is manned or unmanned is not a matter of opinion but is a question of law, and that is the basis for Amherst's objection.

The Court: Overruled.

Mr. Love: And we would like to join in that.

[fol. 343] The Court: Overruled.

* * * * * * *

[fol. 348] Direct examination (Continued).

By Mr. Sampliner:

Q. Tell us your observation of sandblasting in any of these ways relative to any barges afloat. Have you observed it?

Mr. Love: Just one moment. Is this going in over our objection?

The Court: I think it is, yes.

Q. Go ahead. Answer it.

A. Well, I have noticed two different docks where they were sandblasting the deck of barges afloat.

Q. And where did you see this?

A. One of them was at Dravo, Neville Island, and the other was at J. and L. at Floreffe.

Q. Captain, can you describe what you have observed with your own eyes in these various yards or ways relative to sandblasting a barge afloat?

A. Well, I noticed that they had all the equipment necessary to sandblast the barge on the barge. They had their sandblasting machine there and the men were working and I also observed that they had a lifeline around the outer edge on both occasions of the barge.

Q. Now, I hand you this model for the purpose only of [fol. 349] illustration. Would you be able to kindly describe what you mean as the lifelines around the vessel and how they are fastened? Show his honor how they are fastened.

Mr. O'Farrell: Is it understood that this line of testimony all goes in over the objection of both defendants?

The Court: Proceed.

A. They are fastened by clamps. There is a ring that goes around the bitts and from that ring there is a stanchion that stands up the height of—oh, three feet, and through the top of it you either have a ring welded in it or it has a hole drilled through it.

That is also done on this bitt and on the kevels or bitts or whatever there is around it. It goes clear around the outer edge, the outboard edge, and then through these rings there is a line threaded through.

Q. Can you describe to his honor how they are fastened onto the saddle of the kevel?

A. Well, there is a clamp that comes down over the center of the kevel here and this clamp squeezes together. It comes in like that and then the bolt comes through up here and squeezes it together. It makes it substantial. It could be knocked over, but it would warn anyone touching that line that he was near the edge.

[fol. 350] Q. All right, and is that the purpose of the stanchion line?

A. Yes, sir.

Q. Did you see any other safety gear? Using that barge model, did you see any other safety gear on board as you observed the sandblasting operation?

A. Well, I noticed that all employees wore life jackets on these barges or belts, life belts.

Q. Did you observe any other equipment?

A. And there was ring buoys and in one particular case at Dravo we were laying right alongside, we come up and tied right along the side of their barge. We were on the motor vessel Victory at the time and we tied along the side of this tank barge that they were sandblasting.

Q. Is that similar to the barge in question here?

A. Yes, sir.

Q. Go ahead.

A. And I noticed on this barge that there was ring buoys forward and in the center and aft, and they also had lines attached to each of the ring buoys.

Q. Did you ever observe in your experience and as you were master of any vessel in navigating the inland waterways, did you ever notice any sandblasting where they used [fol. 351] the junk lines?

* * * * * * *

A. Well, a junk line is a piece of line that is too short to use in navigation of a barge and they use it just mostly around landings to lash the barges together, and may be twelve, fourteen, fifteen feet long, but it wouldn't be large enough or long enough to handle the barges out in the way or to move the barge, such as they do, so we call them on the river leaving lines.

It is a good piece of line. It would hold the barge or the weight of a barge, and what they do, they hang them over the side in a lot of instances where they are working on a barge. I never noticed them particularly on this one barge, the two barges that I saw, but I do know or have saw lines hanging from the bitts and kevels on barges that they were working on.

The Court: Do you know what the purpose is?

The Witness: It is the purpose if anyone falls in the [fol. 352] river they will have something to get hold of.

The Court: They reach down to the water?

The Witness: They reach down into the water, yes, sir.

The Court: All right.

Q. In your observation of the men working on these barges you have testified you have seen the sandblasting operation. Can you tell us the direction that the men work sandblasting? Do they go forward or do they go backward?

A. Well, at times they might take a step or two forward if they miss something, missed a little spot or something like that, but generally they are walking in a backward position, backward movement.

Q. Can you tell us from what you have observed with your own eyes as to the costume these men were wearing, what kind of headgear, if you can, and whether or not they were wearing the customary life jackets which are approved?

A. They were all wearing life jackets and the men that were doing the sandblasting had a hooded affair over his face that came down around his shoulders. Some of them were square and some of them were sort of oblong with a glass or plastic place to see.

Q. Have you ever observed any belts that any of the [fol. 353] welders would wear with the inflaters?

A. Well, I never noticed it particularly on welders but they used belts.

Q. Can you describe them for the court, please?

A. Well, it is a rubber like tube and it has a sort of like a vial with it that you pull the pin or something and instantly it inflates. I don't know just the mechanism of it or what causes it to, but I have saw the men wear them. They are about four inches wide and it goes right around the waist.

Q. This gear you have described and shown his honor here as far as the sandblasting operation on the barge carrying a liquid, can you tell us in your opinion as to safety gear, how long in your opinion would it take to install that equipment on a barge in time? How long in time would it take?

Mr. O'Farrell: I object, your honor, unless this witness can either testify that he has observed it installed or has installed it.

Mr. Love: I understand that all this is going in over our objection.

The Court: I think you have objected to nearly all the evidence about seaworthiness, but nevertheless I am letting it in—

Mr. Love: I understand.

[fol. 354] The Court: —unless there is a specific objection made to the man's competence to answer the question. I think he ought to show that he knows something about it before he answers.

Mr. Sampliner: All right.

A. I have installed such methods of safety lines around barges of our own. I was on the Ernest T. Weir. I was mate on the Ernest T. Weir and we had—well, it was open house on the boat. We had both boats, the Ernest T. Weir and the Albert E. Heekin were laid up at Pittsburgh City Wharf, and it was open to public inspection, both boats were, but they was a barge they came aboard, a barge first, and we installed the lifelines around these barges with a walkway coming up a ladder or a gangplank also with lifelines down to the end of it reaching out onto the wharf, and to place those lines around the barge a crew of five, I believe

it was—there was four deck hands and myself—it taken us about thirty or forty minutes at the most.

. . . . . .

[fol. 358] Q. Captain, in your experience would you have an opinion as to whether or not it is reasonable and practical for a vessel, CC-204, to carry her own safety equipment wherever she plies?

Mr. Love: We object, your honor.

The Court: Overruled.

Q. Go ahead. Answer it.

A. If the vessel is being loaded or unloaded and not in the tow or not a part of a towboat, such as it is when in tow, it is part of that vessel. That vessel carries the equipment for the boat and the barge safety equipment, so therefore if the barge is lying to and they were loading or unloading, there should be safety equipment on board that barge.

The Court: Let's see if I understand what you are now saying. You say that if a barge is being towed by a towboat [fol. 359] that you think it is not reasonable or practical to have the barge itself equipped with any safety devices?

The Witness: Other than if it is a tank barge it is required that it carry fire extinguishers.

The Court: I mean rescue equipment.

The Witness: Your rescue equipment is carried by the towboat itself.

The Court: Well, then, you do not think it is reasonable or practical for a barge of this kind in a tow, being towed by a towboat, to be equipped with rescue equipment?

The Witness: Well, it would be best if it were.

The Court: Well, then, what do you mean by your distinction between a barge that is laid to and a barge that is in a tow?

The Witness: Well, a barge that is laid to, it most always is a barge by itself. Therefore, there is no gear. The boat that was part of that barge at one time bringing it to the landing while it was in tow, it was part of that vessel bringing it there. It was classed as that vessel.

The Court: Well, then, do I understand that in that situation you do not think it is reasonable or practical that the individual barge be equipped with safety equipment—

The Witness: It should.

[fol. 360] The Court: —rescue equipment?

The Witness: It should, yes, sir.

The Court: Then why did you say a while ago that it didn't need to be because the equipment was on the towboat?

The Witness: That is while the barge is in transit.

The Court: That's what I am asking you now. While the barge is in transit do you say that it is not reasonable or practical that the individual barge be equipped with rescue equipment?

The Witness: If it is provided with a place to carry and store it, it should be on there at all times, but otherwise some of these barges don't have the storage space or they are not equipped with a storage locker or a place to carry this equipment where it can be gotten hold of at once.

The Court: Was CC-204 so equipped?

The Witness: From looking at the pictures, no, sir.

The Court: Then, with reference to CC-204 if it were a barge in transit would you say that it was reasonable and proper to have it equipped individually with rescue equipment or not?

The Witness: Well, I still think it would be a good idea to equip every barge with safety devices.

The Court: Is it customary to do it?

[fol. 361] The Witness: It is not customary, no, sir.

The Court: All right. Go ahead.

By Mr. Sampliner:

Q. Now, when this barge gets off by herself, in order to make the distinction for the court, is that the time in your opinion that the safety precautionary measures should be there?

Mr. Johnson: We object to the question as leading.

The Court: Well, I am going to overrule your objection. It is leading but go ahead and answer.

A. Yes, sir, it is.

Q. In order to make a further distinction, to be of assistance to the court, when the wires are out and the ratchets and the tow is all faced up and made complete, let's say this particular barge would be in the tow, the safety equipment is carried by the towboat, is it not, the pusher? Isn't that right?

A. Yes, sir.

Q. So therefore as she is out there she is a part of the whole, isn't she, of the whole vessel?

A. Of the whole vessel, yes, sir.

* * * * * * *

[fol. 362] Q. Now, can you tell us in order to explain this differentiation as to what happens to a vessel such as this barge when she becomes part of the tow and relative to the men working from the towboat on the unmanned barges—

A. When they pick up the barge up, you mean?

Q. Yes, and after she is in the tow.

A. When they pick the barge up she is securely fastened to the tow, the whole tow, and it is very stiff and rigid and fastened by means of wires and lashings and lines, and therefore it is all one piece. The boat is fastened to this tow in the same manner. It is all one piece and it is detachable one piece at a time, or the whole thing can be tied up as a whole, but it absolutely is part of the vessel.

The Court: Captain Applegate, that is not the point that the court wants to be enlightened on. That's merely a [fol. 363] technicality as to whether you denominate the barge and vessel as one unit. What we would like to know is what provision is made for the safety of the person who may be working out there at a distance from the towboat on one of those barges, which as they are put end to end make up several hundred feet.

The Witness: He receives his safety gear from the boat as he goes out there.

The Court: What does it consist of?

The Witness: It consists of a life jacket or a belt.

The Court: Is that all?

The Witness: That's all he takes with him at that time.

The Court: What do they do, if anything, about ropes and life rings and things of that nature?

The Witness: Well, they don't put that up on a moving tow. They never put up a life ring around a moving tow. There is one around the vessel hanging down from the upper deck or in stanchions along the guard around the vessel itself.

The Court: Then a life jacket or a life belt is the only additional rescue equipment that a man would have under those circumstances over and above what the man had on this CC-204 at the time of Mr. Goett's accident?

The Witness: That would be all that they would have [fol. 364] on, yes. sir, but there would be more lifesaving equipment aboard the vessel.

By Mr. Sampliner:

Q. When you say the vessel, you mean the towboat or the pusher?

A. The towboat.

Q. Can you tell his honor what other safety equipment they have on board these towboats?

A. They have a yawl.

Q. What is a yawl?

A. Well, I guess around here you call them a skiff or a rowboat.

Q. A large one?

A. A large one.

. . . . . .

A. They carry this yawl and they also have life rings at each end of the vessel and on both sides and they have one on each side of the pilot house with a line attached and a light also. I think they did away with the light. They [fol. 365] found out—

Mr. Love: Raise your voice.

A. Someone got burned with the lights. They automatically lit when they hit the water.

Q. Was that attached to a ring buoy?

A. It was attached to a ring buoy, yes, sir.

Q. Do they have all these ring buoys painted white?

A. They are painted white, yes, sir.

Q. When you made the statement that a barge should carry its own safety equipment if it had storage space, what did you mean by that?

A. If it had proper mounts to hang your ring buoys on. They shouldn't just lie loose on the deck because they would be kicked around and the first thing you know they will rot out from lying on the deck. There should be a holder provided to hang them up, from which they could be easily removed and cast into the water.

The Court: What expense or labor would be required to install a holder for a ring buoy?

The Witness: Well, I don't know. It would be made out of steel, probably two and a half inches wide and three-eighths of an inch thick. You could use an angle iron or you could use a pipe, put this in a circle around there with [fol. 366] hooks coming out, just hook the ring buoy in.

The Court: Is it a matter of days of work?

The Witness: No, sir.

The Court: Or minutes of work or hours?

The Witness: It is a matter of hours, it could be made and installed.

* * * * * * *

[fol. 373] Cross examination.

By Mr. Love:

Q. You don't work for any maritime company now?

A. Not at the present, no, sir.

Q. How long has it been since you have?

A. 1953.

Q. Well, back in 1953 were they using on the inland rivers, as to which you say you are certificated, barges of approximately the same size and capacity that were being used in 1955 and at the present time?

A. Well, the largest barge, the largest tank barge that I saw in 1953 was, I believe, 18,000 barrels, so I would judge—

Q. 18,000 what?

[fol. 374] A. Barrels.

Q. Barrels?

A. Yes.

Q. This has been described as 195 by 35 feet.

A. I would say that they was using barges of the same description at that tim as they do now.

Q. Is that size tank barge any larger or smaller than a coal barge?

A. It is larger, yes, sir.

Q. How many tank barges have you seen, Mr. Applegate, in a tow on any of the rivers on which you are certificated?

A. I have saw, I believe, as high as twenty in one tow.

Q. That would be in a double row, ten barges side by side?

A. It was three barges wide and, let's see, and six long and two back along the side of the boat. I believe that's the way they were arranged.

Q. Then there were six barges in front of the towboat that was doing the pushing, is that right, in one line?

A. Yes.

Q. Were they coal or oil barges?

A. They were oil barges.

Q. And they were approximately this same size?

[fol. 375] A. I think so. They belonged to the Ashland Oil and Refining Company.

Q. Well, then, if they were 195 feet long, the end of the farthest barge was over eleven hundred feet from the front of the towboat, wasn't it?

A. That's right, yes, sir.

Q. And over eleven hundred feet, almost twelve hundred feet from the edge of the pushing towboat?

A. You mean from the forward end of the pushing towboat?

Q. From the front end.

A. The bow?

Q. Yes, sir.

A. Yes, sir.

Q. You have seen more coal barges than that in a pushing tow, haven't you?

A. Yes, sir, I have.

Q. And how many did you ever see located?

A. I think I saw the Omar with thirty some barges at one time.

Q. And how many in a straight line in front of her?
A. She had five wide and six long.
Q. Six coal barges?
A. Yes, sir.
[fol. 376] Q. Do you know the length of those barges?
A. 175 feet.
Q. Then that was more than 8,000 feet from the front of that tow to the bow of the pushing towboat?
A. That's right, yes, sir.
Q. And what kind of decks do coal barges have?
A. They have a gunwale or walkway out each side and then they have a line deck on each end approximately twelve to fourteen feet fore and aft and the entire width of the barge, twenty-six feet.
Q. And the rest is simply a cargo hold?
A. Yes, sir.

Mr. Love: We have no further questions.

Cross examination.

By Mr. O'Farrell:

Q. Captain, you say that you did some work on the river in 1953?
A. Yes, sir.
Q. How long did you work in 1953 on the river?
A. I worked, I believe, in February—through the month of January, February and up in March, I believe it was, in 1953.
Q. And excluding those three months that you worked [fol. 377] in 1953 on the river, you have done no actual work on the river since 1950. Is that right?
A. No actual work.
Q. That is correct, is it?
A. That is correct, yes, sir.
Q. Excluding those three months, you have been employed by the firm of Sampliner and Sampliner since 1950?
A. Since 1952.
Q. Is that correct?
A. That's true. Correct, yes, sir.
Q. What kind of work did you do during those three months in 1953?

A. On the boats?

Q. Yes, what kind.

A. I was master and pilot of the Charles Zubik.

Q. On what river was that?

A. Monongahela, Allegheny, and Ohio.

Q. Have you actually ever seen the barge that is involved in this controversy?

A. I probably have. I never noticed it.

Q. Can you say that you have?

A. No, I couldn't say for sure that I have saw the barge. [fol. 378] Q. Did I understand you to say that you had seen two barges of this type—I mean by that the type involved in this controversy—that were being sandblasted?

A. Yes, sir.

Q. And where were they?

A. One was at Neville Island, Dravo Corporation Marine Ways, and the other was at Jones and Laughlin at Floreffe, Pennsylvania.

Q. Did I understand you to further say that those barges were both on the marine ways?

A. No, sir, you did not.

Q. They were both in the river?

A. They were both floating.

Q. I didn't hear the answer. They were both what?

Mr. Sampliner: Floating.

Q. When did you see those two barges, Captain?

A. I saw them either in '51, I believe, at Floreffe—I believe it was '51, either '50 or '51, and the Dravo Corporation, that was in 1942 when I was aboard the motor vessel Victory.

Q. So in the last twenty-five years you have seen two vessels of this type that were being sandblasted?

A. I have probably saw more but never paid no attention [fol. 379] to them.

Q. So far as you recall you have seen two vessels of this type in the last twenty-five years that were being sandblasted. Is that correct?

A. Not in the last twenty-five years.

Q. Last fifteen years? Last fifteen years?

A. Yes.

Q. That is correct?

A. That is correct.

Q. Did you actually ever engage in sandblasting a vessel yourself?

A. No, sir.

Q. Have you ever done any major repairs on a vessel such as painting a whole barge?

A. No, sir.

Q. Have you ever worked in a repair yard that engaged in repairing, painting, and otherwise looking after river-going vessels?

A. I have been aboard vessels that was in repair yards.

Q. I mean by that have you actually ever engaged in repair work in a repair yard?

A. On my own vessel, yes, sir.

Q. On your own vessel?

[fol. 380] A. The vessel that I was employed on, yes, sir.

Q. And you have never engaged in repairing other vessels other than the one that you were on?

A. No, sir.

Q. What kind of a vessel was it that you engaged in repairing?

A. A steamboat. It was the William Wiggam.

Q. When was that?

A. That was in 1951, I believe.

Q. And when did you say you started work on the river?

A. I started to work on the river in 1926.

Q. So since 1926 down to the present time you have engaged in repairing one boat on a river. Is that right?

A. I have engaged in repair work ever since I have started to work on the river.

Q. Didn't you say a moment ago when I asked you the question that you had engaged in repairing just the one boat that you named?

A. In the dock. You asked me, yes, sir, in the dock.

Q. And that's the only ~~one that was ever~~ in the dock that you engaged in repair work on?

A. Well, would you call painting repair?

Q. Repair by sandblasting.

[fol. 381] A. Well, I never have done any sandblasting but I did painting of boats when they would come in at the dock for inspection, whether they was pulled out on

the ways, and I have did painting, cleaning and painting of hulls numbers of times ever since I have started steamboating, too numerous to mention. I couldn't tell you how many times.

Q. How wide is the gunwale on a coal barge?

A. They vary in different widths.

Q. Well, approximately how wide?

A. The barges that they make today have a gunwale of about twenty to approximately twenty-four inches, something like that, I would say.

Q. And as I understand your evidence, while barges are in tow it is not customary for them to carry any kind of rescue equipment on the barge itself?

. . . . . .

[fol. 382] A. No, it doesn't. No.

Q. It isn't, is it?

A. No, sir, it isn't.

Q. And a man is in far greater danger of drowning when he falls off of a barge in a tow—

. . . . . .

[fol. 383] Q. —than he is when he falls off of the barge sitting, as the barge was in this controversy from which Mr. Goett fell?

. . . . . .

A. I understand the question. If a man fell over the head of the tow while moving, if he had on a hundred life jackets he would probably drown if he fell directly over the head of the tow, but if he fell off to the side of the tow, the wash of the break coupling or the coupling of the barges would shove him away from that boat; so if he had a life jacket on, he more than likely would stay afloat until they [fol. 384] could lower a yawl and go get him.

Q. Assuming that he had a life jacket on?

A. Yes, sir.

Q. If he didn't have a life jacket on, it would be far more dangerous to him to fall off a moving tow than fall off of a vessel moored as close to the bank as you understand this vessel was—

. . . . . .

Q. —at the time that Mr. Goett fell from it?

. . . . . .

A. At the time Mr. Goett fell from this barge I understood he was on the outboard outriver side towards the center of the river, was he not?

Q. That's correct.

A. In order for Mr. Goett to get ashore he would either have to swim upstream and around the head of that barge or swim downstream and go in under the stern of the barge to get ashore if he had nothing to hang onto.

If a man would fall off of a moving vessel the current [fol. 385] from the break of the barges would have the same effect on him whether he had a life jacket on or not. It would still throw him away from the barge, and also as he come back to the boat there is a break around the head of the boat where the water goes out from, would throw him away from it.

If he fell directly over the side of the vessel, the boat, and it was a screw wheel boat, as he went down below the bottom of the boat the suction of the propeller would pull him back through the propeller and he would be killed, drowned there, if he did not have a life jacket on; but if he was already in the water and was able to stay afloat by means of swimming he would not be in any more danger from a moving vessel than he would be from one lying still, if he was able to swim.

Q. If he could stay afloat?

A. If he could stay afloat, yes, sir.

. . . . . .

[fol. 396] Mr. Love: I would like to ask Mr. Huling to take the stand.

Reed F. Huling called as a witness on behalf of the Defendant Union Carbide and Carbon Corporation, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak loud.

The Witness: Reed F. Huling.

Direct examination.

By Mr. Love:

Q. Will you give us your name, Mr. Huling?
A. Reed F. Huling.
Q. Where do you live?
A. Scot Depot, West Virginia.
[fol. 397] Q. That's in Putnam County?
A. Yes, sir.
Q. What do you do?
A. I am a supervisor at the South Charleston plant.
Q. Supervisor of what?
A. Department head of the process safety department of the South Charleston plant, Union Carbide Chemicals Company.
Q. That means processes within that plant, does it?
A. Within the confines of chemicals property in the State of West Virginia.
Q. Do you have an employe or does the company have an employe under you, whose superior you are, by the name of Rex Buckley?
A. Yes.
Q. Do you know Mr. Buckley?
A. Yes.
Q. Are you his direct superior?
A. Yes.
Q. Will you tell us whether Mr. Buckley in addition to his work for Carbide does any independent work?
A. Yes, he does.
Q. What is that work?
A. He is a certified gas chemist, certified by the American
[fol. 398] Bureau of Shipping.
Q. By the American Bureau of Shipping?
A. Yes, sir.
Q. Can you tell us whether on October 2nd, 1955, at which time it is shown in the evidence Mr. Buckley made a gas inspection of tank barge CC-204, whether he was working for Carbide or whether he was not?
A. He was not working for Carbide.
Q. I hand you the original certificate covering his work on that day and will ask you if you can identify that as Mr. Buckley's signature.

A. I believe that to be his signature.

Q. Can you tell us from your records for whom he was working on that day, if you know?

A. We have a record of his, Mr. Buckley's, that—

Q. I don't know that it would be proper for you to testify from his record. If you don't know for whom he was working—

A. We have a record that he did not work for Carbide that day.

* * * * * * *

[fol. 402] Cross examination.

Mr. Love: Excuse me. I neglected to ask Mr. Huling, or rather to show why Mr. Buckley is not here. Where is Mr. Buckley?

The Witness: He is in Seadrift, Texas, at one of the Carbide plants. He is on company business.

* * * * * * *

[fol. 411] Colloquy Between Court and Counsel

Mr. Love: Now, if your honor please, I would like to direct the attention of the court at this time to certain regulations of the Coast Guard.

* * * * * * *

Mr. Love: I can either do this by giving your honor a pamphlet and copies of those regulations which we understand have the force and effect of law, or I can give the citations in the record or I can read them into the record, as your honor may prefer, but I want to get them into the record at this time for your honor's convenience.

The Court: What is the objection?

Mr. Goldstein: The objection first of all is that the lawsuit is not and has never been based upon any violation of any Coast Guard regulation. This is based solely upon the general maritime law duty to provide a seaworthy vessel.

Under those circumstances any record of any violation or any record of nonviolation would not be admissible because it is entirely irrelevant to the case. The only ques-

tion that is relevant to the case is whether or not this [fol. 412] vessel is seaworthy. That is the first.

. . . . . .

[fol. 413] Mr. Love: Before I read them I would like to refer your honor to question number 19 of the plaintiff, which asks us the date of the United States Coast Guard or American Bureau of Shipping inspections of the vessel for five years, which we got for them. At that time apparently they thought these rules and regulations had somethin, to do with it.

I will first refer your honor to Rule 31.15-5, which appears on page 13 of the Coast Guard book. "Tank barges need not be manned unless in the judgment of the Officer in Charge, Marine Inspection, such manning is necessary [fol. 414] for the protection of life and property and for the safe operation of the vessel: Provided, however, That towing vessels, while towing barges which are not required to be manned, shall carry in the regular complement of the towing vessel and shall have on board at all times while towing, at least one licensed officer or certificated tankerman."

Definition of laid up or dismantled, on page 2 of the pamphlet, section 30.01-5(d)(2), that provides that any vessel that is laid up or dismantled is not required to meet any of the regulations, without reading them.

The same thing as to section 31.01-1.

On page 16 of the pamphlet, section 32.01-10, "All tank vessels, except unmanned tank barges, the construction or conversion of which is started on or after July 1, 1951, shall be fitted with fixed or portable rails on decks and bridges. All rails shall be in at least two courses, including the top, and shall be at least thirty-six inches high. Rails shall consist of solid or tubular sections or chains or wire rope or a combination thereof.

On page 47, section 33.40-5, "All tank barges regardless of size shall have at least two life buoys on board: Provided, however, That unmanned barges are exempt from this section."

[fol. 415] Page 63, section 34.40-5(d), "Each unmanned tank barge not provided with a cargo pump room shall be

equipped with at least one two and one-half gallon foam-type fire extinguisher or the equivalent, which may be carried aboard the barge or the towing vessel while under way."

Page 66, section 35.01-1, "Riveting, welding, burning or like fire-producing operations shall not be undertaken within or on the boundaries of bulk cargo spaces or in spaces adjacent thereto, until an inspection has been made to determine that such operations can be undertaken with safety."

It then describes how a gas chemist shall make such an inspection.

* * * * * * *

FREDERICK MARTIN recalled as a witness on behalf of the defendant Amherst Barge Company, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Johnson:

Q. What is your name, sir?

A. Frederick Martin.

Q. You are the same Fred Martin who was previously sworn in this case?

A. That's correct.

Q. And you have twice previously testified in this case?

A. That's right.

Q. Mr. Martin, what experience have you had in dock and boat repair or barge repair operations?

[fol. 417] A. Practically the full time that I have been employed by the two companies.

Q. How long did you previously testify that you had been so employed?

A. It will be twenty-three years this June.

Q. When was the barge CC-204 delivered to the Amherst Barge Company?

A. That was delivered on Saturday.

Q. Do you recall what day that was?

A. I believe that's October the 1st.

Q. I believe you have already testified that there was a gas free inspection, that is, inspection made by Mr. Buckley on October 2nd, 1955. Is that correct?

A. That's correct.

Q. What was the purpose of that inspection?

A. That is for the gas free, fire safe, and safe for men to work.

. . . . . .

Q. It was safe for gas?

A. Safe for gas.

[fol. 418] Q. Safe for men to work so far as gas is concerned. Is that right?

A. That's right, sir.

Q. What was the result of that inspection?

A. It was proved to be safe. In other words, the certificate was issued so that we could proceed with work.

Mr. Johnson: That certificate, I believe, is already a part of the record in this case. Is that right, Mr. Love?

Q. When did you first go on board the CC-204 yourself?

A. It was on the 3rd, on Monday.

Q. I believe that you have already testified when you were on the stand before that there were no stanchion lines or railings around the outer decks of the barge. Is that correct?

A. That's correct.

Q. Was there anything unusual about that?

A. Not to my knowledge.

Q. Was it customary for such barges to be equipped with a rope or any other kind of a rail?

A. To my knowledge, no, sir, at that time.

Q. I believe you have already testified that there were no life rings or life buoys or similar equipment on board [fol. 419] the barge.

A. That's correct.

Q. Did you or Amherst employes remove any kind of safety or rescue equipment from the barge that was on it at the time it was delivered to you?

A. Not as far as rescue equipment, no, sir.

Q. Did you remove any kind of lifesaving or safety equipment from it?

A. Not in the—no, sir.

Q. Is it customary for such barges to be equipped with life rings or buoys?

A. Not to my knowledge.

Q. Was it the practice or custom of Amherst to put rings or buoys on barges that were brought to the yard for repair while afloat?

A. No, sir.

Q. Was it the practice of Amherst to erect a fence or a rail or to put a rope or line around the outer edge of the deck of such barges when they were delivered there for repairs while afloat?

A. No, sir.

Q. How long have you been engaged in supervising or directing the work of repairing floating barges for the [fol. 420] Amherst Barge Company and its predecessor company?

A. Since 1936.

Q. Prior to Mr. Goett's accident had anyone engaged in doing that repair work on floating barges fallen overboard so far as you know?

A. Not in the repairs of the barges, no, sir, to my knowledge.

Q. Since the time of Mr. Goett's death has any employe of the barge company engaged in doing repair work on barges while afloat fallen overboard?

A. Not to my knowledge. There is one incident—no, not to my knowledge on that, no, sir, not in the repairs.

Q. You referred to one incident and then you didn't go on with that. Would you tell us just what you had in mind, what you referred to?

A. What I had in mind was that we did have an old gentleman back before this company had taken over that had fallen between the barges but not in the river. In other words, he wasn't submerged in the water. He had fallen on some driftwood between the barges and was never submerged. In other words, the men were there to get him out.

Q. Did he lose his life?

A. No, sir.

[fol. 421] Q. And he did not fall in the water?

A. He was about half, I would say, submerged in the water to the waist.

The Court: What was he doing on the barge at the time?
The Witness: He was a pump boat or barge tender.
The Court: Fell off the side or the end?
The Witness: Walking the gunwale, yes, sir.

Q. What type of barge was that?
A. That was a steel barge.
Q. Was it a tank barge or a hopper barge?
A. That was a hopper barge.
Q. As I understand it, a hopper barge has only gunwales to walk fore and aft on instead of a flat deck like a tank car.
A. That's right.
Q. Mr. Martin, at the time of Mr. Goett's death did the Amherst Barge Company require men working on the barges to wear life jackets?
A. It wasn't required, but we did stress safety in a man, if he was afraid, that he had those for his benefit. In other words, they were furnished.
Q. State whether or not life jackets were available for anyone who wanted to use one.
[fol. 422] A. The life jackets were always available.
Q. Where were they available?
A. We had them on our steamboats, plus a sufficient number in the supply house, more than what employes we employed there in the operation.
Q. Do you know approximately how many were available in the supply house?
A. I would say in the neighborhood of ninety.
Q. State whether or not the supply house was kept open.
A. At all hours during the work time, yes, sir.
Q. Did the men have occasion to go there?
A. Several times a day.
Q. Do you know whether Mr. Goett had occasion to go there on the day of his accident?
A. Mr. Goett was there the morning of this accident because I was talking to him that morning.
Q. What would a man, an employe who worked on these barges, such as Mr. Goett, have to do in order to get a life jacket if he wanted one?
A. Ask is all.
Q. Where did he have to ask?

A. The supply department. They also have equipment. I may add that. In other words, any tool, any equipment [fol. 423] they wanted they could always get any type of material that way they wanted.

Q. Prior to Mr. Goett's accident were there any of the men who worked on the barges who did wear life jackets at any time?

A. There was one man in particular that wore one in working on the wheel of a boat.

Q. Were there any others?

A. No, sir, the others seemed to think they would be in the way of working.

Q. Did you or to your knowledge anyone on behalf of the company ever do anything to discourage employes from wearing life jackets if they wanted to?

A. Not at all.

Q. Prior to the time of Mr. Goett's death what was the attitude of the employes who worked on these barges with respect to wearing life jackets, if you know?

A. The attitude was that, in other words, you couldn't force them to wear them. It wasn't compulsory and most of them had been around the river most of their lives and wouldn't wear them.

Q. State whether or not there was opposition or resistance among the employes to working in life jackets prior to [fol. 424] that time.

A. Yes, there was quite a bit.

Q. Did you wear a life jacket yourself while you were working on the floating barges?

A. No, sir.

Q. Did you want to wear one?

A. I always felt that—in other words, I could do better without a jacket in working.

Q. Why did you feel that way?

A. Because they were bundlesome. Another thing was you didn't have the freedom to work and lots of times it would be detrimental to your working. In other words, it was in the way. Sometimes you might hook on something and cause you to go overboard.

Q. Mr. Martin, do you know of any situations in which in your judgment you would be worse off if you fell over-

board with a life jacket on than you would be if you fell overboard without one?

Mr. Pauley: If your honor please, we object to that.

Mr. Goldstein: Objection, sir. That question is too all inclusive. If Mr. Johnson will explain exactly what he means in the situation—.

[fol. 425] Mr. Johnson: I will make it more specific, Mr. Goldstein.

Q. Let me ask you this. If you or any other man working on this barge happened to fall overboard at the upstream end and there was any current, what would be more probable or what would be the most probable result?

Mr. Goldstein: Objection, sir, to that. He hasn't certainly shown that he is an expert on water currents or what might happen, and he may talk about it as far as he is concerned but the indjvidual man himself has something to do with what happens to him.

Mr. Johnson: I don't think he has to be an expert to answer that question, if he knows.

The Court: He has said, I believe, that nobody except Goett ever fell off, so I don't see how he could possibly know what would happen.

Mr. Johnson: Your honor, I believe he testified that no one except Goett had ever fallen from one of Amherst's barges while working on the barge. He may have knowledge of somebody else in other circumstances that fell in the river.

The Court: Other circumstances wouldn't be pertinent here.

Mr, Johnson: All right. I will withdraw the question. [fol. 426] Your honor, instead of withdrawing that question, if the court would indulge me I would like to ask for permission to have the witness vouch the record as to what his answer would have been.

The Court: All right. Go ahead.

Q. Do you remember the question, Mr. Martin?

A. Yes, sir In other words, wearing a life jacket in certain operations it would cause drowning more so than it would be lifesaving.

Q. Why is that so?

A. In falling under a barge you have no sense of direction. It holds you up under the barge and you would have no chance of getting away from the barge, which would cause friction against the bottom of the barge and it would cause more effort or use more strength to get out of it if you were able to get out from under it.

Mr. Goldstein: If your honor please, that entire answer was based upon an assumption that if a man would fall from a barge he would automatically fall under the barge.

Mr. Johnson: We were just vouching the record.

Mr. Goldstein: I would like to make my objection on the record.

[fol. 427] The Court: I sustained your objection but I permitted Mr. Johnson to have the question answered.

Mr. Goldstein: Thank you, sir.

Q. Mr. Martin, where were you when you first learned Mr. Goett was overboard?

A. I was working on the marine ways helping and giving instructions on the fabrication of a new steel cradle preparatory of pulling the CC-204.

Q. With reference to the marine railway which has been shown in some of the photographs that are in evidence and which is located along the shore just upstream of the location of the CC-204, I believe, as shown in those pictures, where were you at the time you learned of that accident?

A. I was at the upper side of number seven track.

Q. Is number seven the farthest track downstream in the marine railway?

A. No, sir, number eight is.

Q. And it is next to the farthest?

A. It is next to the far one.

Q. How did you first learn that Mr. Goett was overboard?

A. A man hollered "overboard" and, of course, I heard. I was near enough to hear that.

[fol. 428] Q. What did you do then?

A. I immediately ran to the digger boat, to the life ring, back along the side of the CC-204, and threw it into the river.

Q. How long did it take you from the time you first heard the shout or cry that told you that something was wrong until you arrived on the deck of the CC-204 at the point where Mr. Goett was in the water with the life ring?

A. I would say not over two minutes at the most.

Q. What did you do when you arrived there on the edge of the barge?

A. I immediately threw the life ring to Homer Schultz, which was in the water right below me.

Q. When you looked into the water when you arrived there on the edge of the deck, what did you see?

A. When I got the ring and started up the outside, which I considered the port side—I mean the starboard side, heading upstream, I ran along the outside edge looking over in the water to be able to locate the nearest man or the man that was in trouble, seeing an object in the water near Mr. Schultz and hearing one of the other boys say, "There he goes". That's all that I can remember on that.

Q. Did you actually see Mr. Goett in the water?

[fol. 429] A. I couldn't say for sure, no, sir. I saw an object in the water, but not knowing whether it was him or not.

Q. Who was in the water at that time?

A. There was three. Bob Riggall was one, Harold McCormick and Schultz.

Q. What was done in order to retrieve Mr. Goett from the water?

A. An immediate sound was put out, more so at the point of getting a yawl down from our other fleet, and putting in rescue efforts, which I immediately went to the supply house, summoned the Malden Fire Department, also the ambulance service with resculator. Also we put in operation immediately for our diver that we have, of putting him in the water to retrieve the body.

Q. Were you there when the body was retrieved?

A. I was, sir.

Q. How was he brought to the surface?

A. By a barbwire.

Q. And from what or from where was that manipulated, if you know?

A. That was over the side of the barge, sir.

Q. Was there during that effort any boat of any kind on hand?

[fol. 430] A. Yes, sir, there was a yawl approximately, I would say, 350 to 400 feet away.

Q. When did the yawl arrive at that spot?

A. The yawl was coming down the river when we were putting the diving equipment over into the calking flat at the center of our marine ways.

Q. How long from the time that you first arrived on the edge of the deck of CC-204 was it that the yawl arrived on the scene?

A. The yawl was on its way when I left. In other words, they were getting a wire in which we had grappling hooks and a barbwire, but the decision on the wire was the barb-wire was the best means of getting him out if the diving had failed. That is, the men in the water were so worn out that they were unable to go on down.

* * * * * * *

[fol. 432] Q. How long had Mr. Goett been working on the CC-204 prior to his death?

A. I believe he went on there the second day; in other words, to get his equipment over, and that was the day before. In other words, moving the sandblaster and all that equipment down on the boat, which took approximately a day's time to get it all up together there, we started the sandblasting the following morning.

Q. What date was it, then, that he first went on board?

A. I believe that was the 4th.

Q. And what time of day did he go to work on the barge on that date?

A. That I don't remember.

Q. Can you tell us whether it was in the morning or the afternoon?

[fol. 433] A. In other words, on the boat itself, I would say, with the boat itself intermittently; in other words, moving the supplies over the hill, he was engaged in the preparation for the duties that were to come the following day.

Q. Well, I mean doing any kind of work on the barge.

A. He was on and off the barge the day before.

Q. Do you know what time of day on the 4th he first went on board and began to do this work?

A. Prior to the day?

Q. On the 4t.

A. On the 4th, I couldn't tell you, sir.

Q. What time did he go to work on the barge on the 5th?

A. At 7:30. He went right to work after the whistle blew.

Q. Except for lunchtime was he on the barge continuously from 7:30 until the time of his death when he fell off?

A. On and off. He had made approximately three trips to the supply house and to the sand storage.

Q. Had he done repair work on other barges at this same mooring on any occasions prior to this barge?

A. He had done work on other barges, yes, sir.

Q. For how long a time?

A. Well, it would also be intermittently because we had [fol. 434] certain types of work that we would do on these barges. In other words, there wasn't any certain pattern for any set type of work to be done.

Q. Had he done work on repairing barges at this mooring intermittently, then, throughout his period of employment?

A. Over a period of time, yes, sir.

Q. What was the weather like on this day?

A. It was clear.

Q. What was the temperature, if you know?

A. I would say approximately eighty degrees, warm.

Mr. Johnson: I believe that's all. You may inquire.

Cross examination.

By Mr. Goldstein:

Q. Mr. Martin, to begin with, you stated that there was no requirement by Amherst for these men to wear life jackets. Is that correct?

A. There wasn't—in other words, they wouldn't wear them. They were there to wear them.

Q. Mr. Martin, please answer my question. Did you

state on direct examination that there was no requirement by Amherst Barge Company for these men to wear life jackets? Yes or no.

A. There was no requirement.

[fol. 435] Q. Thank you. But you stated that it was stressed that they should?

A. Yes, sir.

Q. Is that right? Can you tell me who stressed that?

A. I, for one, myself.

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Q. At what time did you stress the use of life jackets aboard these barges?

[fol. 436] A. It wasn't necessarily the barges. It was any place, mostly in wheels of boats and high water.

Q. Mostly in wheels of boats?

A. Yes. If you have ever worked on steamboat wheels, things that way, yes.

Q. Was that the purpose for the wearing of the life jackets?

A. Yes. In other words, if a man was afraid to go without one he could wear it. They were available to him.

Q. Did Mr. Goett ever work on a steamboat for your company?

A. Yes.

Q. Did you ever stress to him personally the use of life jackets?

A. No, sir, it was always a practice to carry that through our foremen.

Q. Through your foremen?

A. Yes, stress it to our other workers.

Q. Who were your foremen?

A. We have Jennings Johnson as one of the foremen.

Q. And did you stress to Mr. Johnson the fact that he should stress it to the rest of the men?

A. It is always a safety measure to stress everything [fol. 437] of importance that way to all the men in all the workings.

Q. And you considered the use of life jackets important. Is that correct?

A. If the man was afraid of the water.

Q. Will you answer my question? Did you consider the use of life jackets important to the safety of the men?

A. Not to me.

Q. Did you consider it important to the safety of the other employes of Amherst?

A. It was up to them whether they wanted to work with them.

The Court: The question is why did you stress their use if you didn't think it was important for them to be used?

The Witness: The thing was we could not force the men to use it.

The Court: But why did you stress their use if you did not think it was important that they be used?

The Witness: The thing was, we stressed it—I am a little mixed up. Would you mind repeating the question?

Mr. Goldstein: Miss, would you repeat the question?

The Court: The question I want to know, you said that you did not consider it important and yet you also said that you stressed the fact that they ought to use them. I [fol. 438] want to know why, if you didn't consider it important.

The Witness: That was considered if the man couldn't swim and the position that he worked in.

The Court: And you didn't stress it to everybody?

The Witness: Not to everybody, no, sir.

The Court: All right.

By Mr. Goldstein:

Q. Am I correct in saying you did not stress it to Mr. Schultz back there?

A. Mr. Schultz was a swimmer.

Q. And am I correct in saying you did not stress it to Mr. Goodwin back there?

A. I don't remember whether I did to him or not.

Q. And what about Mr. Hammons back there? Did you stress it to him?

A. Mr. Hammons is a swimmer.

Q. In other words, the only reason that you would possibly stress it is whether you decided or whether you were

informed or found out that a man could or could not swim. Is that correct?

A. If the man thought it wasn't—in other words, if he needed it, he had it.

Q. I am sorry. I did not hear you.

A. If a man needed it, if he thought within himself that [fol. 439] he needed it.

Q. It was the policy of the company to let the man come for it and tell you whether he needed it?

A. It isn't the policy of the company. The thing I am trying to get over, if the man thought he was in danger, rather than put a man in position to where it would endanger him, he had access to anything he wanted that way.

Q. That wasn't my question. My question was did you decide upon the importance of stressing this to each particular man on the basis of whether he could or could not swim?

A. No.

Q. What basis did you stress it on?

A. If the man thought he was—in other words, in a position. I never put a man anywhere that I wouldn't go myself and it would be up to the individual.

Q. Did you ever tell them that it was up to the individual? Is there a company policy for you to explain to the men that it is up to them to come to you and tell you whether it was provident for them to wear life jackets?

A. It was not a custom to wear them. In all of the works we ever had, it wasn't a custom.

Q. Mr. Martin, I want to find out who made the first overture, you or the men, in the use of life jackets.

[fol. 440] A. The company made it.

Q. The company made it?

A. Yes, sir.

Q. And how did the company go about that?

A. The company received them to wear them and the men wouldn't wear them because they couldn't get them so they would be comfortable enough.

Q. Didn't you just say to us that there was no requirement?

Mr. O'Farrell: Your honor, I think the witness is confused.

The Court: I think he is confused too, but I want him to get himself out of his confusion.

Mr. O'Farrell: The use of the word overture, I don't think he has the faintest idea—

The Court: He knows what the word requirement means.

The Witness: We didn't require a man to wear them.

The Court: You just said you did. You just said you required them to wear life jackets and they wouldn't do it. What do you mean by that?

The Witness: We were trying to get it across to get a jacket—in other words, we were working up to that point.

[fol. 441] The Court: Why did you think they needed a jacket?

The Witness: Well, our work was changing all the time.

The Court: Did you think that they needed jackets for their safety? You can answer that yes or no.

The Witness: I would say yes.

The Court: All right.

By Mr. Goldstein:

Q. Thinking that they needed jackets, did you do anything to enforce the use of those jackets by the men when they went on the barges?

A. There was an enforcement, trying—

Q. Please, Mr. Martin, answer yes or no. Did you do anything to enforce what you realized was a need for the men to wear life jackets?

A. I didn't at the time, no, sir.

Q. Did anybody else from Amherst Barge as far as you know?

A. As far as I know they had, yes, sir.

Q. Can you tell me the name of the person who did?

A. That was Mr. Charles Jones.

Q. Mr. Charles Jones?

A. Yes, sir.

[fol. 442] Q. And what position does he have with the company?

A. Vice-president.

Q. Do you know if Mr. Jones saw Mr. Goett the date of the accident?

A. No, Mr. Jones was in Europe.

Q. In Europe, and how long had he been in Europe?

A. Approximately, I would say, a month.

Q. And how much time actually did Mr. Jones spend with Amherst Barge in Reed, West Virginia?

A. Most of his time when he was there.

Q. When he was there, and how often was he there?

A. Almost every day.

Q. Except for the month before the accident. Is that correct?

A. Yes, sir.

Q. And was that the first time in your memory that he had not been in Reed, West Virginia?

A. No, he was in and out all the time.

Q. Was Mr. Jones—he was an officer of the corporation, but was he in a sense a man on the job or was he a man who stayed in the office?

A. Mr. Jones is on the job as much as he is in the office.

[fol. 443] Q. Is he on the barges?

A. Yes, sir.

Q. And he watches out for his men?

A. Along with all the rest of us, yes, sir.

Q. And I assume that he has been on barges through the years going back as far as Amherst was doing business?

A. That's right, as far as the Amherst people, yes, sir.

Q. And I think you testified in those periods of time before the accident the men never wore life jackets. Is that correct?

A. We tried to get them to.

Q. Answer yes or no.

A. No.

Q. And I assume when Mr. Jones went aboard those barges he saw the men didn't wear life jackets. Is that correct?

A. Yes.

Q. And I assume that Mr. Jones, realizing the need of the men, as you did, to wear life jackets, did nothing to enforce the rule and regulation?

Mr. Johnson: I object to that, your honor.

The Court: Sustained. He wouldn't know about that.

Q. In any event, you never enforced the rule and regulation?

[fol. 444] A. No, sir.

Q. And in any event the rule and regulation was never enforced. Is that correct?

A. No, sir.

Q. There is no question about that in your mind, is there?

A. No, sir.

Q. In the Coast Guard hearing that we have discussed, and I think you know the one I am referring to, you testified in answer to question thirty-five, and this is the question: "Is it not the policy of the Amherst Company to prepare or furnish any kind of safety equipment for any kind of unsafe or hazardous work? If so, what and for what?" and your answer was, "It has not been a policy of the company for men working on the barges on the ways to wear life jackets while working, although they do supply them for the boats." By "boats" you meant the river boats. Is that correct? You didn't mean barges.

A. Yes, sir. May I add one thing to that?

Q. No, sir. You mean—

The Court: He may make his explanation if he wants to.

A. There is no need for wearing them on the ways. The [fol. 445] ways were on dry land.

Q. But this barge was not?

A. That's right, it wasn't on the ways.

Q. The men were aboard this particular barge when it was afloat?

A. That's right.

Q. You say there was no need for the men to wear them while the barge was on the ways?

A. That's what my statement is based on, on the ways.

Q. On the ways?

A. That's right.

* * * * * * *

Q. But when you said that in your opinion life jackets are not needed while the barges are on the ways, did you refer to on the ways as distinguished from in the water?

A. That's the statement there. In other words, that's what he asked. That's the answer I gave him, they weren't [fol. 446] used on the ways.

Q. And you concur, then, in my statement that you did distinguish the need of safety jackets while the boats were on the ways as against while they were in the water?

A. No, my answer was only to that, as to his question.

Q. Well, do you make the distinction that I just mentioned?

A. The only thing is I was going by his question when I gave him that answer. That's all.

The Court: He said do you make the distinction now?

Q. Do you make the distinction now, at this time, as between the time when the barges are on the ways and when they are in the water?

A. There was no need when they were on the ways. There might be when they are afloat.

Q. What did you say? I didn't hear the last part.

A. The life jackets would be used when they are afloat.

Q. They should be used?

A. We are stressing that now, yes.

Q. Can you tell me why they weren't used on October 5, 1955?

The Court: I think he has already gone into that. He said they were not used because the men wouldn't use them. [fol. 447] The Witness: That's right.

Q. The men wouldn't use them, and as long as they didn't use them you didn't enforce the order?

A. I had nothing to back me up on the enforcement.

Q. And you simply let it lie. Is that right?

A. Yes, and I still don't have.

Q. You acquiesced in the condition. Is that so?

A. That's correct.

Q. Would you say it is a fair statement that the reason you acquiesced in the condition is because the men could do their work a little faster without the life jackets?

A. I wouldn't say they could do it any faster.

Q. Would you say they could do it without being hindered by the life jackets?

A. You mean the fastness or in their work?

Q. In their work or in fastness, one or the other or both.

The Court: I think the witness ought to understand whether you are inquiring about his purpose for not enforcing the wearing of life jackets or about the men's purpose in refusing to use them.

Mr. Goldstein: I believe he did so, your honor, that he did testify that the reason the men told him that they [fol. 448] would not wear the life jackets is that it hindered their work.

The Court: That's right.

Mr. Goldstein: I wish to find out just how it hindered their work to wear life jackets.

A. Did you ever try to?

Q. Will you please answer my question?

The Court: Don't ask questions. Just answer them.

A. I know. I am just trying to get it across.

Q. I know you are. Will you please answer my question?

A. Would you read that again?

Mr. Goldstein: Miss, will you read it back, please?

(The question was read as follows: "I wish to find out just how it hindered their work to wear life jackets.")

A. One was they are hot. That's one thing. They are bundlesome. You have no free movement of the arms, and in sanding—

Q. Go ahead.

A. In sanding or burning you can burn one up every time you put one on.

Q. That's sanding or burning? What do you mean by the word burning?

A. Burning is when you are cutting metal.

Q. Is sandblasting the cutting of metal?

[Fol. 449] A. It is a cutting of the surface of the metal.

Q. It is a cutting of the surface of the metal?

A. Cutting and cleaning the surface of the metal.

Q. And is it your testimony that those life jackets if worn would be detrimental to a person?

A. I would say it would be in the way to him in free movement.

Q. And what would that mean in the way of his own safety?

A. I would say it would be a hindrance to him in sandblasting for his own safety. In other words, he wouldn't have the proper balance or, in other words, maneuverability.

Q. So that you now tell us that those life jackets were detrimental to workers. Is that correct?

A. I beg your pardon? Come again.

Q. You now tell us that those life jackets were detrimental to workers. Is that correct?

A. I would say in the sense of the word where—if I was working with one I wouldn't want it.

Q. And you would feel it would be detrimental to your safety on the ship?

A. In my work, I would say.

Q. Naturally, in your work. If you were sandblasting [fol. 450] you would feel those life jackets would be detrimental to you?

A. Yes, sir.

Q. Detrimental to the effect that it might affect your health, it might burn?

A. Yes.

Q. And that might be enough reason for a man to refuse to wear them. Is that correct?

A. That would be one thing.

Q. And is that the only type of life jacket made available by Amherst Barge?

A. We have tried several types.

Q. And you feel there is no type in this wide, wide world that could give those men maximum safety with minimum detriment?

Mr. Johnson: Your honor, I don't think that is a proper question.

Mr. Goldstein: I think it is quite proper, sir.

The Court: It is a little broad. It should be the types that were reasonably available.

Mr. Goldstein: Thank you, sir.

Q. Now, you had one type of life jacket. Is that correct?

A. Yes.

[fol. 451] Q. You had one at the time of Goett's death?

A. Yes.

Q. And that life jacket you felt was detrimental, you personally felt was detrimental?

A. That's right. I am speaking for myself.

Q. Did you have any other type of life jacket available at that time?

A. We had a life ring but no other jacket.

Q. A life ring? What did that life ring consist of?

A. The life ring is made of cork which is thirty inches in diameter, consisting of a rope five foot long. It has a rope that is interlaced in the outer part of the canvas and which meets U. S. Coast Guard specifications.

Q. And that's not worn by workmen?

A. No, it can be.

Q. But it was not?

A. No.

Q. And you didn't enforce any rule or regulation for them to wear that?

A. No, sir.

Q. Forgetting for a moment about the life ring, knowing that these jackets were detrimental to the health of the men and knowing that they refused to wear them for that and [fol. 452] possible other reasons, what arrangements or what investigations did Amherst Barge make to obtain other life jackets that might be proved more suitable for the type of work Amherst Barge was engaged in?

A. You will notice in the contract agreement of September the 21st, 1955, the negotiations were to get a suitable life jacket that the men could wear.

Q. Am I to assume from that that it was realized by Amherst Barge that these were unsuitable?

A. Yes. In other words, we were getting one more suitable for the men.

Q. Now, then, is it a fair statement that there was no suitable life jacket in the control of Amherst Barge for these men to wear aboard barges?

A. In other words, we were testing, we were trying to get something that they could use and stand up under the same regulations.

Q. You were testing on the men on the barges?

A. No. We were, in other words, getting the fellows to wear them where they would be more comfortable.

Q. And how did you make this testing?
A. By buying different life jackets.
Q. And where did you test it?
[fol. 453] A. In other words, the men wore them.
Q. Where did you test it?
A. Sir?
Q. Where did you test it?
A. With the men.
Q. With the men during their working hours?
A. Yes.

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Q. During this testing period when you were trying out what later proved to be unsuitable equipment, what arrangements did you make for the safety of your men?
A. The life jacket itself was safe before it was put on the men. The only thing was we were trying to get something comfortable enough for the men to wear them. We weren't afraid of the life jackets themselves—I wouldn't have been—any of them that we have got.
Q. But you didn't wear them?
A. I could hav worn it.
Q. I am asking you whether you did.
[fol. 454] A. I didn't wear them, no.
Q. There was a good reason in your mind for not wearing them?
A. I could swim and I wouldn't wear it.
Q. You wouldn't wear it?
A. No.
Q. You considered it harmful to your health rather than helpful?
A. I wouldn't say it was harmful.
Q. Why didn't you wear it?
A. Because I didn't need it.

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Q. When you say that you first heard that Goett had fallen overboard, you heard the words "man overboard"?
A. That's right.
[fol. 455] Q. And you started running?
A. That's right.

Q. And by the time you reached the place where Marvin Goett was in the water it was too late to save him. Is that correct?

A. I wouldn't say that I wasn't up to that point. In other words, I did not know what it was going to take to save that man. I was getting every bit of equipment I could. In other words, I was trying to help those in the water.

Q. And your helping those in the water wasn't in time to save Marvin Goett. Is that correct?

A. That never entered my mind.

Q. What did enter your mind?

A. Getting the most help at the nearest time, that's to the boys that were in the water.

Q. And the nearest time that you got there was too late for Marvin Goett?

A. I couldn't tell you, only the fact of him being under the surface.

Q. He was under the surface when you arrived. Is that right?

A. Yes. I never did see him other than just an object in the water.

[fol. 456] Q. Isn't it your testimony that one of the men yelled, "There he goes"?

A. Yes, sir, and I was on the other end of the barge coming toward them running.

Q. You hadn't quite gotten to the place when, "There he went"?

A. That's right, "There he goes".

Q. You were too late to save him?

The Court: You have asked that two or three times, Mr. Goldstein.

Q. You were too late to throw him anything he could reach, he was under the surface of the water?

A. I only saw three men in the water.

Q. And you didn't see Goett?

A. As far as I could say seeing him, no.

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[fol. 458] The Court: You are not making any claim against the Amherst Barge Company and I think all of

this examination is improper. There has been no objection made, but it has nothing to do with the seaworthiness of the barge, and that's your only claim against the other defendant and not against Amherst.

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CHARLES T. JONES called as a witness on behalf of the defendant Amherst Barge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak plain and loud.
The Witness: Charles T. Jones.

[fol. 459] Direct examination.

By Mr. Johnson:

Q. What is your name?
A. Charles T. Jones.
Q. Where do you live, Mr. Jones?
A. 1502 Hampton Road.
Q. What is your business or occupation?
A. I am employed by the Amherst Barge Company as a vice-president. I have been with the company since it was formed in December of 1949.
Q. What is the nature of your duties with the Amherst Barge Company?
A. To explain that, I am also employed by its parent and have been since October 1940. My duties are to coordinate the activities of Amherst Barge Company and Amherst Fuel Company.
Q. How old are you, Mr. Jones?
A. I am thirty-eight.
Q. Are you familiar with the operations of the Amherst Barge Company on and about October 5th, 1955?
A. Yes, sir.
Q. Before October 5th, 1955 and on that date did the Amherst Barge Company require its employes working [fol. 460] on barge repair work to wear life jackets?

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A. It wasn't the policy to force the men to wear life jackets.

Q. What was the company's policy at that time?

A. The company's policy was pretty well keyed to a contract which we had negotiated with District 50 of the United Mine Workers, which was effective on September 21st of 1955. In that contract there is a clause number twelve which indicates that it would be the joint responsibility of the union and the company to furnish jackets for these men.

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[fol. 461] Q. Mr. Jones, I will hand you this exhibit, which is the defendant number 2 exhibit number 1, and I will ask you to read that portion of the exhibit which you refer to.

A. "The Company shall furnish safety jackets to the employes on each towboat and the employes who work on the river at landing units, and employes in these [fol. 462] units must wear such jackets when they are out on barges and/or in hazardous places."

Q. What change, if any, in the company's policy with respect to the wearing of life jackets resulted from the adoption of this new contract?

A. We ordered a kapok type jacket shortly after the contract was effective in the hopes that we could provide a jacket that was a more acceptable jacket to the men.

Q. Did you have life jackets before the contract went into effect?

A. We have always had the approved type cork life jacket.

Q. You say approved type. Approved by whom?

A. Well, the Coast Guard up until recently only approved one type life jacket. That is, in my opinion and my understanding. The cork jacket has always been kept on our towboats and our landing boats and there was quite a number of them in the supply house. Those jackets have always been available since my connection with the company.

Q. Do you know approximately how many life jackets there were in the supply house on October 5th, 1955?

A. Approximately seventy jackets.

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[fol. 463] The Court: Do you dispute the fact that there were that many there?

Mr. Goldstein: I dispute the fact that he has any knowledge of this entire matter.

The Court: I am not talking about his knowledge. Do you dispute the fact that the life jackets were there?

Mr. Goldstein: No, not at all.

The Court: Then why are you objecting to this? Go ahead.

By Mr. Johnson:

Q. What was done, if anything, with respect to the company's supply of life jackets after the contract which you have testified about went into effect?

A. Well, we began ordering the kapok type jacket.

Q. Why did you do that?

A. Because it was the jacket that the various companies signatory to the contract had decided to buy. I am not [fol. 464] certain whether the first ones we got were fully approved because later we had to buy a kapok jacket with reflector light strips on it, and I don't know whether the first ones had those on them.

Q. What was the purpose of the strip that you refer to?

A. So that the jackets would show up when the men wore them on the tows at night and catch them in the arc lights.

Q. Did it have any other function or purpose?

A. As far as I know it didn't.

Q. Did it have anything to do with the buoyancy of the jacket?

A. It had no effect on the buoyancy.

Q. Did I understand you to say that this is also an approved type jacket?

A. I think it is approved for limited use. The cork type jacket is the kind furnished on all ocean liners and excursion boats and I believe they will stand up for emergency a considerable number of hours. I don't know that the kapok jacket is approved for extended emergency.

Q. Does the kapok jacket have any advantage over the cork type?

A. Yes, it is a much lighter jacket, easier to wear and generally much more comfortable type jacket.

[fol. 463] Q. What had been the attitude of the Amherst Barge Company employes towards working on barges while wearing life jackets before the change of policy that accompanied the adoption of the new contract?

A. The company had not required these men to wear jackets and they didn't wear them.

Q. Do you know whether they had any objections to wearing them?

A. Not actively directing the work on the ground, I couldn't cite a specific example of the objection. I can only cite from my own experience that they are a rather bulky and heavy jacket.

Q. What experience have you had with them yourself?

A. Well, I was in the Navy and I have been connected with this company since 1949.

Q. What is your own experience with them as to whether or not they interfere with your work?

A. The cork type jacket?

Q. That's right.

A. I would say it would be almost impossible to work with a cork type jacket.

Q. Have you also had experience with a kapok type jacket?

[fol. 466] A. The kapok type jacket is much more acceptable. It is still bulky and would hinder work but it is a much more serviceable jacket from the standpoint of work than the cork type jacket.

Q. Do I understand, then, that after the adoption of the new contract you changed the company policy with respect to wearing of life jackets by your employes?

A. Yes, it is the policy to urge everyone working for the company in and around the water to wear life jackets. We do not have the authority to discharge a man for failure to wear a jacket.

Q. How do you know that you do not have this authority?

A. This was thoroughly discussed when we negotiated the contract effective September 21st, 1955.

Q. Discussed with whom?

A. Mr. Charles Neal.

Q. Who is he?

A. He was then vice-president of District 17 and at that time we were transferred from District 17 to District 50. He was chairman of the negotiations.

Q. What was the outcome of those discussions?

A. Mr. Neal said that he would urge the officials of District 17 and District 50—it was a joint meeting to that [fol. 467] extent—to cooperate with the company to see that the men wore life jackets. It wouldn't be a point of discharge, but District 50 would make every effort to back the company up and see that these jackets were used.

Q. Did you specifically ask him if he or his union would back you up in the event you discharged a man for refusing or failing to wear a life jacket while working on a barge?

A. I did, and most of the conversation as to wearing life jackets was directed towards men working on tows and the principal reason for the insertion in the contract was to see that men working on the tows would wear them. I think that the coverage on the bank was an auxiliary coverage to that extent, but I specifically asked him that question.

Q. What was his answer to that specific question?

A. He said that he wouldn't be a party to an agreement whereby we would have the right to discharge for a violation of a company rule, of that type rule.

Q. Since that time what success or lack of success have you had in your efforts to get the men working on the barges to wear life jackets while at work?

A. We have had generally a favorable success. Most men carry these jackets with them. We haven't been one [fol. 468] hundred per cent successful. The men don't wear them while they are working. They have them most of the times in a reasonable proximity. We haven't been one hundred per cent successful and I don't suppose we will be.

Q. You say that they carried them with them. What do you mean by that?

A. The jacket is carried by one of the arm straps or shoulder straps and laid down beside the man at work. He lays it down himself.

Q. Instead of putting it on and wearing it as he is supposed to?

A. That's correct.

Q. Are you or have you been aware of any opposition or resistance from the men to working with these life jackets of the type that you are now using?

A. I wouldn't say that there was overt opposition. There is some negligence, which accounts for the fact that we don't get one hundred per cent of the men wearing life jackets.

Q. Are they hot and uncomfortable and disagreeable?

A. They are, quite, particularly in this kind of weather.

Q. Does that have anything to do with the fact that [fol. 469] they are not worn all the time by all the men?

A. I would say it would have a great deal to do with it.

* * * * * * *

[fol. 470] Mr. Johnson: At this time I would like to ask Mr. Goldstein and Mr. Sampliner if they will stipulate that [fol. 471] the Amherst Barge Company at the time of Mr. Goett's death was a subscriber to or had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act and had provided through an insurance company the coverage which that act requires for its employes?

Mr. Goldstein: I will stipulate with one exception, that although they had proper coverage, I don't believe that they carried out their duties under the clauses of the act which stated that they had to inform the widow of any deceased worker of her rights under that act.

Mr. Johnson: That was no part of my stipulation so far as the stipulation goes.

Mr. Goldstein: You said not only were they covered but that they complied with. My understanding of the word complied with is that they did everything that they were supposed to do under that coverage and under that act. They did not comply with that part.

Mr. Johnson: Will you stipulate that they were covered by the Longshoremen's and Harbor Workers' Compensation Act and that they had provided through an insurance carrier the coverage which that act requires for their employes?

Mr. Goldstein: Yes, sir.

The Court: All right.

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[fol. 474]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

* * * * * * * *

Transcript of Proceedings—May 15, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 15th day of May, 1957.

* * * * * * * *

[fol. 476] Third Day

The trial was resumed pursuant to adjournment on yesterday, there being present the same parties as heretofore noted.

CHARLES T. JONES resumed the stand, having been previously duly sworn, was examined and testified further as follows:

The Court: Are you through with your direct examination?

Mr. O'Farrell: Yes, your honor, we are.

The Court: Go ahead, gentlemen.

Cross examination.

By Mr. Pauley:

Q. You are Mr. Charles T. Jones, are you?

A. Yes, sir.

Q. The same gentleman who was on the stand yesterday?

A. Yes, sir.

Q. Mr. Jones, I hand you the Defendant Number 2's Exhibit Number 1. That is the agreement between the United Marine Workers, Division of District 50, and Amherst Barge Company. You recall that agreement, don't you?

A. Yes, sir.

The Court: It is United Mine Workers, isn't it? You [fol. 477] called it Marine Workers.

Mr. Pauley: It is Marine Workers. It says United Marine Workers, Division of District 50, United Mine Workers. Thank you, sir.

Q. Mr. Jones, did you have a contract with the United Marine Workers, Division 50 of the United Mine Workers, before September 21st, 1955?

A. No, sir.

Q. There was no outstanding agreement prior to that time. Is that correct?

A. With District 50.

Q. Did you have an agreement with any union that represented the employes of Amherst Barge Company before September the 21st, 1955?

A. District 17 of the United Mine Workers of America.

Q. And then your employes' union was transferred to the jurisdiction of District 50, is that correct, of the United Mine Workers?

A. As of September 21st.

Q. Did that contract prior to September 21st, 1955, have any safety provisions in it, if you recall?

A. I do not recall them specifically.

Q. Now, this contract that has been introduced as [fol. 478] Defendant Number 2's Exhibit Number 1, it was agreed upon on September 21st, 1955. Is that correct?

A. That was the effective date. It was the culmination of agreements arrived at prior to that date.

Q. And Mr. Goett's death took place on October 5th, 1955, some fourteen or fifteen days later. Is that correct?

A. Yes, sir.

Q. Do you know when the printed copy of the contract was delivered to the individual employes of your union?

A. No, sir, I do not.

Q. Was a copy of the contract posted on the bulletin board or made available to the employes, if you know?

A. I do not know that it was posted on the bulletin board. I assume it was made available when the contract was ratified.

Q. This contract says that the company shall furnish safety jackets—that's on page 12, Article XII—to the employes on each towboat and the employes who work on the river at landing units. What is a landing unit, Mr. Jones?

A. In the accepted sense, I assume the landing unit is any place where barges are moored.

. . . . . .

[fol. 479] Q. Now, Mr. Jones, you have heard the testimony here and you know where barge CC-204 was located, do you not, at that time?

A. Yes, sir.

Q. Did this contract in your opinion cover the men working on that barge?

A. The men working on that barge were covered by the agreement effective September 21st, 1955.

Q. Mr. Goett belonged to what you called the repair gang. Isn't that correct?

A. Well, Mr. Goett was classified, I suppose, at that time as a sandblaster.

Q. In other words, they did the repairs on the vessels that were brought into your port for repair. Is that correct?

A. Mr. Goett and the other men did that work, yes, sir.

[fol. 480] Q. I believe you heard Mr. Martin's testimony yesterday and he said you had no definite policy towards these men with reference to requiring them to wear life jackets. Isn't that correct?

A. Prior to September 21st, that is correct.

Q. Did you have any definite policy after September 21st towards these men with reference to giving them instructions to wear life jackets?

A. The policy was to urge men to wear life jackets.

Q. Well, did you actually urge them to wear life jackets?

A. We ordered jackets after the contract was signed.

Q. But did you order the men to wear life jackets after that time?

A. Yes.

Q. Did you personally order them yourself or did Mr. Martin do it?

A. The men—I want to explain that order. As I testified yesterday, we cannot discharge a man for failure to wear a life jacket. The men were ordered in the sense that they were urged to wear life jackets and we purchased life jackets for that use.

Q. Yes, but when did you urge them and how? Was it verbally or by written notice on the bulletin board, or [fol. 481] how did you urge them to wear life jackets after September 21st, 1955?

A. It was carried out through our organization.

Q. Well, who, specifically?

A. Well, the normal chain of command.

Q. Well, sir, who is in that chain of command, Mr. Jones?

A. We have several departments. Mr. Martin has one.

Q. Mr. Martin said he didn't do it, didn't he?

Mr. Johnson: Your honor, I object. I think he is simply arguing with the witness as to what another witness testified. That's not the question.

The Court: It is not proper to ask one witness about what another witness said, but, of course, you can go right ahead and probe as to how the orders were given to wear the jackets.

Mr. Pauley: Yes, sir.

Q. Who besides Mr. Martin did you direct to instruct the men to wear safety jackets?

A. The order or the urging to wear safety jackets arose from the signing of the contract.

Q. I didn't quite hear that, sir.

A. The order or the urging, whichever you may interpret it, arose from the signing of the contract September 21st. No directive could have been given to the men

[fol. 482] to wear these jackets prior to the date that they could be furnished.

Q. When were you able to furnish the safety jackets?

A. Sometime in the early part of October.

Q. Was it before or after the death of Mr. Goett?

A. The first order was placed on September 29th.

. . . . . .

The Court: As I said yesterday, I think it is largely foreign to the issue of seaworthiness, but it has been gone into at length by counsel for Amherst and I think then the cross-examination is proper, and the court will later rule as to what the material evidence is on the issues before the court.

. . . . . .

By Mr. Pauley:

Q. And the life jackets were not available until after Mr. Goett's death. Is that correct?

A. I can't answer that.

Q. You say, Mr. Jones, you don't know whether they were available or not on the date of Mr. Goett's death?

A. Yes, sir.

Q. Isn't it a fact, Mr. Jones, that none of the men work-[fol. 483] ing on this barge were wearing life jackets on the date of his death?

A. That's been the testimony.

. . . . . .

[fol. 485] Q. I believe you said yesterday that you had a discussion with a Mr. Neal of the mine workers organization, did you not, relative to the enforcement of the safety regulation requiring the men to wear safety jackets?

A. Yes, sir.

Q. And what was it you said he told you?

A. Mr. Neal told me that he wouldn't be a party, or words to that effect—

Q. Just a minute. Excuse me, sir. I can't hear. All right, go ahead.

A. He told me that he wouldn't be a party, or words to that effect, to a mechanism to discharge a united mine worker, but he would urge the officials of District 50 who were then coming into this agreement to cooperate with the company and make every effort to urge the men to wear these life jackets. Our conversation, as I testified yesterday, was primarily directed to getting men to wear jackets on tows.

[fol. 486] Q. On tows?

A. That is the principal reason the discussion came up, but in the agreement it was written as you see it.

Q. In other words, your discussion with him did not pertain to these repairmen necessarily?

A. It pertained to everybody covered by the contract. However, our principal men we discussed were men working on tows.

* * * * * * * *

Q. Well, did you make any attempt after the 21st of September, 1955, with the officials of the union to ask the men to comply with the regulations requiring safety jackets?

* * * * * * * *

A. I did not personally.

Q. Did anyone in the company do so?

A. I do not know.

Q. Didn't you testify yesterday that some time prior to this agreement you were experimenting with safety jackets?

A. No, sir, I don't think I testified to that.

[fol. 487] Q. Well, were you, or do you know that your company was experimenting with safety jackets at that time?

A. You say at that time? What period do you mean?

Q. Well, I say prior to September 21st, 1955, and during the period September 21st, 1955 through October 5, 1955.

A. In 1951 we purchased a kapok jacket which was in addition to the accredited cork type life jacket carried on one of our harbor boats.

We purchased this jacket in our endeavor to find a jacket which would be comfortable for the men to wear while at

work. As I remember, we purchased three types of jackets. I specifically know of the date of one. It was all in the same period. The experimentation was not to test the jackets for survival. It was only to test them for their wearing qualities and the comfort of the men while they worked.

Q. I believe you testified yesterday that the jackets you had on hand at the time were impractical as far as being able to use them while the men were performing their work. Is that correct?

A. You are now referring to the cork type Coast Guard approved jackets?

Q. The jackets that you claimed were available for the men. Is that right?

[fol. 488] A. The jackets that were available, the cork type jacket, I did testify that that is a bulky and difficult jacket to wear while working.

Q. But didn't you testify yesterday, Mr. Jones, that the jackets you had available were almost impossible to wear when working at the same time, that you yourself found that to be true?

A. I may have used the word impossible. They were a difficult jacket to wear while working.

* * * * * * *

Q. Mr. Jones, in furnishing life jackets to men who are to perform work in the yards, do you feel that it is your duty to provide a jacket that they can work in practically?

A. It is our duty to provide an approved type jacket [fol. 489] which is comfortable for the men to work in. You must realize that we have to buy an approved type of jacket.

Mr. Pauley: Yes, sir, that's all.

Redirect examination.

By Mr. Johnson:

Q. Mr. Jones, have you ever seen, have you ever found or have you ever had demonstrated to you to this day any type of life jacket which is comfortable for a man to work in?

A. In my experience I have never known a jacket which is comfortable for active working conditions.

Q. There has been some mention here in the record of a type of safety device known as a life belt. Are you familiar with that?

A. Only through my experience in the Navy.

Q. And what was your experience in the Navy with that type of belt?

A. At the time I wore that belt in the Navy I was in the Seabees. I did all kinds of construction work. I have done welding with that type belt.

Q. And what observations did you make as to the practicality of the use of that type of belt in connection with the kind of work that is done on these barges at Amherst?

A. My difficulty was with that type belt it has the in-
[fol. 490] flatable cartridge that is in the belt. I continually inflated it. If you kept the cartridge out of the belt you didn't have that trouble, but if you went overboard when the cartridge was out of it, you would be in pretty bad shape.

Q. You say the cartridges continually inflated the belt while you were at work? Would you explain how that happened?

A. The belt was triggered to inflate the cartridge by a sharp needle being thrust through a babbited seal. On any pressure in the vicinity of the cylinder it would inflate.

Q. When you moved and bent over in the course of your work, did that exert pressure and cause it to inflate?

A. In my experience it did.

Q. Do you think that type of belt is practical for the type of work these men do on these barges?

A. In my opinion it is not.

Q. You did have a union contract with a different labor organization prior to September 21st, 1955. Is that your testimony?

A. Yes, sir. It was District 17.

Q. Was there any requirement in that contract with respect to wearing life jackets while at work on barges?

A. If there was, I am not familiar with it.

Q. I believe Mr. Pauley asked you if you knew when the [fol. 491] printed contract of September 21st was distrib-

uted. You said that you did not. Do you know whether or not that contract was printed and distributed before or after October 5th, 1955?

A. My answer was that I did not because I do not know the date. My estimate would be that it would probably be ninety days after the signing of the agreement before the printed copy was distributed.

Q. Do you actually recall the approximate time interval before the printed contract was distributed?

A. It was some months, because we had never received an agreement printed in this manner before, and a check of our records doesn't give us any help as it was delivered by courier, but in my opinion it was probably ninety days.

Q. Now, in order that there will be no confusion or doubt about your testimony, I want to ask you this. Did the Amherst Barge Company have on hand available to its employes before September 21st, 1955, life jackets for the use of the men working on these barges?

A. Yes, sir, we had them in the supply house and on our boats.

Q. And what type of life jackets were those?

A. It was the approved, Coast Guard approved type cork life jacket.

[fol. 492] Q. When you speak in your testimony of efforts to obtain a more suitable type of jacket after September 21st, 1955, what are you referring to?

A. Well, in my testimony yesterday I said that it seemed to me as though some of the jackets we purchased did not have the scotch light strips on them, reflector light strips, and that we had to purchase other jackets to replace these because the reflector light jacket was much more applicable for men working on tows at night because the reflector light strips showed up in the lights of the boat.

Q. Are the reflector light jackets that you referred to as having been obtained after September 21st cork type jackets or kapok type jackets?

A. Kapok type jackets.

Mr. Johnson: That's all.

Recross examination.

By Mr. Pauley:

Q. Mr. Jones, you had the original copy of this contract in your office, didn't you, on September 21st, 1955?

A. I suppose it was. I was not in my office.

Q. Mr. Jones, knowing that the men were not wearing the life jackets because they were uncomfortable and there was no particular policy towards enforcing them to wear [fol. 493] them, don't you think that under the circumstances these men were working under that you should have installed life rings and throw lines or stanchion lines around that barge?

Mr. Johnson: I object, your honor.

The Court: Sustained.

Q. Mr. Jones, what else did you do to protect these men, knowing that they didn't wear life jackets—

* * * * * * *

Q.—while working on the barge?

* * * * * * *

A. We had ordered life jackets as soon as it was practicable.

* * * * * * *

Q. Did you do anything else?

A. The testimony indicates there was nothing else on the barge. I am answering your question as well as I can. We [fol. 494] ordered life jackets on the 29th. The contract was signed on the 21st. It took us some little time to find who to order them from and what life jackets would be acceptable, and that was the earliest we could get the order in.

The Court: Mr. Pauley is asking whether anything else was done besides ordering life jackets.

The Witness: No, sir, not to my knowledge.

* * * * * * *

Mr. O'Farrell: Now, your honor, yesterday when I asked counsel for the plaintiff to stipulate that Amherst was a subscriber to the Longshoremen's and Harbor Workers' Compensation Act and to stipulate that there was an insurance carrier who carried Amherst's obligations, counsel for the plaintiff stipulated that but stated in open court that Amherst did not advise the widow of her benefits, and that it was Amherst's duty.

I have now the file of Amherst and I will state to the court and as counsel for the plaintiff to admit it in order to shorten this matter that the employer, Amherst, first of all reported this accident to the West Virginia State Compensation Commission two days after the accident hap-
[fol. 495] pened, on the assumption that it was covered by the West Virginia State Compensation Department, that a few days later Mr. Cyr of the United States Department of Labor advised or asked Amherst Barge about this accident, that correspondence then ensued between Mr. Cyr and the compensation department and Amherst, and as a result of that correspondence that on December 1st, 1955, that this accident was reported to the United States Department of Labor, acting by and through Albert J. Cyr, Deputy Commissioner, as a compensable case under the Longshoremen's and Harbor Workers' Compensation Act, and that it was the assumption of the employer that from that point on the U. S. Department of Labor would see that the widow and children of the decedent were advised by Amherst's insurance carrier that Amherst's insurance carrier stood ready to make these payments provided by the act.

I assume counsel will admit that. If they don't, here is the file, let them read it.

The Court: What you have said does not necessarily refute what Mr. Goldstein said. His statement was under the act it was the duty of Amherst to notify the widow and that Amherst did not notify the widow.

Mr. O'Farrell: I am simply offering this to show that Amherst so far as I can determine discharged its duty, and if there was any notification to be done, that the United
[fol. 496] States Department of Labor was to take care of

it. It was reported as a compensable case, and from there on it was theirs.

The Court: That is a matter of opinion as to what the act requires.

Mr. O'Farrell: I am offering this to sustain our position that we discharged our duty.

Mr. Goldstein: That's all it is, sir. That's all that is involved here. Obviously Amherst never did notify Mrs. Goett. They took it for granted that the government would do it for them. Nothing more I think needs to be said on that.

Mr. O'Farrell: And I want Mr. Pauley to admit that in December, 1955, that as counsel for the plaintiff in this action and her children he was advised by Amherst's insurance carrier that Amherst's insurance carrier stood ready to make these payments under the act. Is that correct, Mr. Pauley?

Mr. Pauley: That is correct and, your honor, I think Mr. O'Farrell will admit that the only notice that Mrs. Goett received from the company was a letter with some West Virginia Workman's Compensation funds.

Mr. O'Farrell: The point I want to make, your honor, is that we were willing, ready and able from the beginning as soon as it was determined whether the insurance carrier or what compensation department should cover this risk [fol. 497] to see that this widow and these children were paid their compensation. I don't want your honor to have any misunderstanding about that.

Mr. Goldstein: Your honor, may I only say that the entire thing is completely immaterial. There is no claim under the compensation act. Mrs. Goett has decided to pursue her remedy against third parties. I think this entire conversation was unneeded.

* * * * * * *

Mr. Goldstein: If your honor please, I have one rebuttal witness. Captain Applegate, will you take the stand, please?

ALVA FULTZ APPLEGATE recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Goldstein:

Q. Captain, I show you this book and ask you to identify it. First may I have the title, please?

A. "Towboat River."

Q. And who is the author or authors?

A. Edwin and Louise Rosskam.

. . . . . .

[fol. 498] Q. Captain, who published that book?

A. I would think it would be Duell, Sloan and Pearce, Incorporated.

Q. And can you tell me the year of publication?

A. Copyright 1948, by Edwin and Louise Rosskam.

Q. Captain, was the first time you ever saw this book earlier this morning?

A. Yes, sir.

Q. And who gave you the book to look at for the first time?

A. You did, sir.

Q. Now, Captain, you notice that there are a number of white slips at specific pages of the book, do you not?

A. Yes, sir.

Q. Will you kindly turn to the first white slip that you come to? Turn to that page, sir. On the left page what do you see? Will you explain that picture?

Mr. Johnson: Your honor, I object.

[fol. 499] The Court: Sustained. If you want to introduce the book, offer it and it will show what is in it, if it is admissible.

Mr. Goldstein: May I offer this book in evidence?

The Court: What is it?

Mr. Goldstein: It is a book of pictures of, among other things, towboats and barges, both manned and unmanned, used in the rivers I would assume throughout the United States, and they are pictures which have on them unmanned barges while in transit life rings attached to the decks of

those barges, and I would like to offer this in rebuttal evidence to show safe practice among certain companies. Is there any objection?

Mr. Love: If your honor please, we object. Union Carbide objects. We never heard of the book. Nobody offered anything to show that this book was of any authority whatsoever. A man who has been offered here prior to this time said he never heard of the book until this morning. How it could be offered as having any probative value we fail to see.

Mr. O'Farrell: Amherst joins in the objection, your honor.

The Court: As I understand, it is not a question of any authoritative value of the book, but the point is that there are photographs in the book which show barges in transit [fol. 500] and which show that these barges are equipped with safety rings. Insofar as that is shown it would seem to me that it would be prima facie proof that barges were equipped with safety rings.

Mr. Love: Those barges in those pictures.

Mr. Goldstein: That's all I intend to prove, sir, the custom as shown by these barges, nothing more.

The Court: This, of course, shows no universal custom, but it shows whatever it shows.

Mr. Johnson: Your honor, I submit that it would have no relevancy at all unless it were possible to know what the barges were, where they were at the time the pictures were taken, what use they were being put to, and all the circumstances that surround it.

For all we can know from simply looking at the pictures the situation pertaining to those barges and the circumstances surrounding them are entirely different from anything involved in this case.

The Court: Well, that may weaken their probative weight, but nevertheless I don't think that weakens their admissibility.

Mr. Johnson: Your honor, is Mr. Goldstein prepared to testify as to where these barges were, what their use was, what river or stream or ocean they were on, or anything about the circumstances?

[fol. 501] The Court: I don't think Mr. Goldstein is going to testify at all. If he did, I wouldn't let him.

Mr. Johnson: I should say Mr. Goldstein's witness.

Mr. Goldstein: I think my witness will testify to all the information he knows about those pictures when he is shown the pictures, and I think it is up to your honor to decide what weight his testimony shall be given, nothing more, nothing less.

The Court: If the witness can recognize the type of barge, if he can recognize the spot in the river or the particular river, I think he should be permitted to testify. Otherwise the book will be admitted, that is, the photographs will be admitted for such weight as they may have independently.

Mr. Goldstein: Thank you, sir.

Mr. Love: May we see where the record stands, if your honor please, what the last question is?

The Court: The last thing is the offer of this book in evidence.

Mr. Love: And our objection.

The Court: Your objection, and I admit the book insofar as it relates to these photographs, and I think counsel should state on what pages the photographs are so that I can determine just what is admitted in evidence.

[fol. 502] Mr. O'Farrell: It is understood Amherst also objects to the introduction.

. . . . . .

[fol. 503] Q. Now, Captain, will you kindly turn to the first page in which there is a white slip? That page, as you will note, has been marked in pencil 15-A. Can you tell us what that picture represents?

Mr. Love: We object for the additional reasons that the witness has not testified he was present when the picture was taken or knows in which direction it was taken or what kind of camera with which it was taken or by whom it was taken or when it was taken and when it was developed and whether or not it was reduced, increased or distorted, and for the other reasons assigned.

Mr. O'Farrell: Amherst joins in the objection.

[fol. 504] The Court: I think these objections are frivolous. They are overruled.

. . . . . .

A. This picture shows a tank barge with the cargo in the hold and also aboveboard in tanks. There are pipelines, hoses, wires, lines, chains and a ring buoy.

Q. Captain, is this a manned or an unmanned barge?

Mr. Love: We object, your honor.

The Court: I will sustain that objection, but if you want it for the record you may have his answer.

Mr. Goldstein: Yes, please.

A. I would say at the present time this is an unmanned barge.

Q. How can you tell it is unmanned?

A. There is no housing that I can see.

Q. Can you tell me who this barge is owned by from the picture?

A. From the picture I would say that it is owned by Standard Oil Company.

Q. Thank you, sir. Will you now turn to the page of the second white slip? You will note that it is marked on the bottom of the page 15-B. Can you tell us, if you know, what that picture represents?

[fol. 505] A. It represents barges either being loaded or unloaded at a dock.

Q. Is this barge a manned or an unmanned barge?

Mr. Love: Same objection.

The Court: I will sustain objection but permit the answer to be made for the record.

Q. Are there any men aboard that barge as far as you can see?

A. As far as I can see, no.

Q. Is there any housing on that barge as far as you can see?

A. As far as I see, no.

Q. From your experience would there be any place aboard that barge for a man to be while that barge was in transit?

The Court: I don't understand what you mean, for any man to be.

Mr. Goldstein: To stand watch while the vessel was in transit.

A. You mean living quarters?

Q. That's right, sir.

A. No, there is none that I can see.

Q. Can you tell us from the picture who you believe owns this barge?

[fol. 506] A. I would say Standard Oil Company.

Q. And are there any life rings aboard that vessel?

A. Yes, sir, there is.

* * * * * * *

Q. Captain, will you now turn to the page with the next white slip? Now, you will note at the bottom of that page it is marked in pencil 15-C. Captain, will you tell us what that picture represents?

A. That picture represents a motor vessel. Whereabouts I couldn't say.

Q. Captain, in your testimony yesterday did you state to his honor and to the court what a bracket which would hold a lifeline or a life preserver would look like and how it would be attached to the vessel?

A. I stated as to how it could be attached to a barge, [fol. 507] but I didn't state as to how it could be attached to the bulkhead of a vessel.

* * * * * * *

Q. Captain, will you turn to the page of the next white slip? You note at the bottom of the page that it is marked 15-D. Can you tell us what that picture represents?

A. That picture represents a towboat and twelve barges, oil barges or tank barges.

Q. Captain, as far as you can see are those barges manned or unmanned?

[fol. 508] A. With the exception of one there—it could be a housing but I don't think it is—the rest of the barges are unmanned as far as I see.

Q. Captain, do you note on that photograph two circles in ink which I placed there?

A. Yes, sir, I do.

Q. Can you point out what is inside those circles?

A. They are ring buoys.

Q. And they are on the unmanned or the possibly manned barge?

A. Yes, sir.

Q. Which one is that?

A. They are on the unmanned barge. This is possibly a manned barge, or could be. It might be a housing over a motor or pumps. I don't know.

Q. But the circles which show the life rings are on the unmanned barge. Is that correct?

A. Yes, sir.

Q. Captain, will you turn to the next white slip? You will note that it is marked on the bottom of the page in pencil 15-E. Will you tell us what that picture represents?

A. It shows a tank barge with a man aboard.

Q. Captain, is that barge a manned or an unmanned barge?

[fol. 509] A. At the present time it would be manned.

Q. Why, Captain?

A. Because there are men on it or a man.

Mr. Love: We move to strike the question and answer.

The Court: I will sustain the objection here. On all these questions as to whether a barge is manned or unmanned, it is my conclusion that that is a legal question and not a factual question, that is, what manned means and what unmanned means.

Of course, we know that it is a factual question as to whether there is a man on the barge at a particular time, but as to whether that makes the barge a manned or unmanned barge I think is a legal question.

* * * * * * *

[fol. 512] Mr. Love: I do want to ask the witness, however, with respect to his opinion that one or more of these barges was a Standard Oil barge.

Cross examination.

By Mr. Love:

Q. Will you tell me which one or more you think were?

A. Where were they marked?

Q. You tell me, please, sir.

A. Wherever you have the markings.

* * * * * * *

[fol. 513] A. That is a Standard Oil barge. (Indicating)

Q. You are now referring to—

A. That barge.

Q. —15-A?

[fol. 514] A. Yes, sir.

Q. You say that's a Standard Oil barge?

A. Yes, sir.

Q. In your opinion?

A. In my opinion, yes, sir.

Q. All right, sir. Now, there are four divisions of the Standard Oil Company and I would like to know first which Standard Oil Company you are referring to.

A. Standard Oil of Louisiana.

Q. Standard Oil of Louisiana. Can you tell me the certification—first, you can identify the barge, can you?

A. I can identify the barge as being a Standard Oil barge.

Q. But not which one?

A. Not which one.

Q. Will you tell me what the certification is?

A. No, I couldn't.

Q. Well, then, you don't know whether it is certificated for inland waters or for the Gulf or for what it may be certificated, do you?

. . . . . .

[fol. 515] A. It would be bound to be certificated for inland waters. Otherwise it wouldn't ply on the rivers.

Q. Yes, sir, but it could also be certificated for the Gulf and other waters, couldn't it?

A. It could be, yes, sir.

Q. Do you know, going back to my question, for what purposes that barge is certificated, and, if so, tell us what.

A. It would be certificated for the carriage of oil or gasolines.

Q. And you don't know whether it is for inland or Gulf or both or either?

A. I do know that it is for inland waters.

Q. But you don't know whether that's all, do you?

A. No, sir, I don't.

Q. And if it were certificated for use in the Gulf, then it would be required to carry rings, wouldn't it?

A. My license—

[fol. 516] Q. I didn't ask you about your license.

The Court: Answer, if you know. Questions that can be answered yes or no—

A. I wouldn't know.

The Court: Questions that can be answered yes or no, answer it that way and then make explanation, if you have one.

By Mr. Love:

Q. In fact, you don't know what barge that is or where it is or how it is certificated, do you?

A. I would say that is a Standard Oil barge on the waters of the Mississippi River.

Q. Do you have an opinion on the ownership of any of those other barges? I thought you gave an opinion on title as to two of them, but I could be mistaken.

A. I believe I did, yes, sir.

The Court: The other was where the barge was at the side of the vessel.

The Witness: Of the dock.

The Court: Of the dock, yes, sir.

Q. You are now referring to 15-B?

A. 15-B, yes, sir.

Q. Did you express an opinion—I am not going to ask you that opinion—as to who owned it?

A. I expressed an opinion that the Standard Oil Com-

[fol. 517] pany owned this.

Q. Which Standard Oil Company?

A. Of Louisiana.

Q. Will you tell us how you distinguish that without any names or anything on the barges?

A. The way we learn from the beginning—

Q. I didn't ask you how you learned. I want to know how you distinguish it.

A. I am trying to explain to you how I can distinguish this particular barge is from our knowledge of memory of

seeing an object or parts of the river. That is the way we acquire our license to pilot or a licensed officer on a vessel of any kind, is memory.

The Court: You mean you are required in order to gain a license to have a knowledge of this kind that you can distinguish ownership of various barges?

The Witness: Not ownership, no, sir, but objects along the river and on the river. We on the river can see a boat miles down the river and just from the outline of that boat, superstructure of that boat, we can tell you without seeing it what boat that is coming without seeing the name.

The Court: The question is whether you can tell in that way who owns a certain vessel.

[fol. 518] The Witness: Well, you know that from past experience of seeing the vessel in their tow and in their landings and reading on the vessels, on the barges, Standard Oil or Union Barge Line.

The Court: So what you are saying now is that this barge in the picture is the type of barge that you know to be owned by Standard Oil of Louisiana?

The Witness: It would be my opinion, yes, sir.

By Mr. Love:

Q. And, of course, you don't know any more about the certification of that barge than you do the other one, do you?

A. No, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Johnson: Your honor, at the time these pictures were introduced I objected to them on the ground that they were immaterial and irrelevant. I don't want to recede from that position, but we would like to cross-examine this witness with respect to the contents of this book other than those portions which have been put in evidence, and if in order to do so it is necessary that we make certain other portions of the book our exhibits in order to cross-examine him with respect to those exhibits or the rest of the book, I would like to do that at this time.

[fol. 519] Mr. Goldstein: I renew my objection, sir.

The Court: I think it would be necessary for you to point out and have marked the parts that you wish to examine him about.

Mr. Johnson: That's what I intend to do, your honor.

The Court: All right.

Mr. Johnson: Mark this Defendant Number Two, Exhibit 6-A

Mr. Goldstein: Your honor, before they are admitted into evidence may I see the articles and see if I have any objection to their pertinency?

The Court: Yes, sir.

Mr. Johnson: I will state what we are doing. On looking through this book we discovered—

Mr. Love: I can't hear you.

Mr. Johnson: I say, what I am attempting to show is that there are in that book which contains these exhibits a great number of pictures of barges of all kinds, sizes, shapes and descriptions, and an overwhelming majority of them, as shown by the pictures, do not contain any life rings such as are shown in the few pictures which have already been placed in evidence.

Mr. Goldstein: May I ask if that is the sole purpose of the introduction of this evidence, just to show that there [fol. 520] are vessels that don't have life rings in the picture?

Mr. Johnson: That's all at the moment.

Mr. Goldstein: May I place my objection on two points? Number one, we will concede that there are certain companies or at least one company that does not carry life rings on its barges. That is Union Carbide.

Number two, the mere fact that these life rings cannot be seen in these pictures does not in any way prove that they are not on the vessel. They may be out of view. They may be hidden by other deck equipment and that's incompetent to show the absence of any life rings on those pictures.

Mr. Love: If your honor please, a statement was made by counsel in this case with respect to Union Carbide and not with respect to any other company, and I ask your honor to strike that from the record.

The Court: Sustained. That will be stricken from the record and the objection will be overruled as to the introduction of these photographs.

Mr. Goldstein: If your honor please, as to the first point concerning Union Carbide, their answers to the—

Mr. Love: I didn't hear you.

Mr. Goldstein: As to the first answer concerning Union Carbide, their answer to our interrogatories propounded [fol. 521] to them by the plaintiff states specifically that there were no life rings ever purchased for the CC-204 and on that basis I made my statement and I will stand by it.

The Court: I have already expunged it as improper and you shouldn't have made it.

Mr. Love: Correct.

OFFERS IN EVIDENCE

The Clerk: Defendant Number 2, Exhibits 5-A to 5-Q, inclusive, admitted.

Defendant Number 2, Exhibits 5-A through 5Q.

The photographs referred to were thereupon marked as indicated above and received in evidence.

Cross examination.

By Mr. Johnson:

Q. First of all, Captain, I understood you to testify yesterday that it was not customary for barges to carry life rings and similar equipment. That is true, isn't it?

A. I might have testified that it was not customary on some barges. I didn't say all barges.

Q. Don't you recall that you testified yesterday that when barges are in tow it is customary and usual to carry life rings, life jackets on the towboat and not on the barges?

A. I don't think that I meant that it wouldn't be cus- [fol. 522] tomary, but it was the practice on the boat to have life rings and life jackets.

Q. Did you or did you not so testify yesterday? Certainly you can recall what you said on the stand yesterday.

A. In the exact words, would you say that would be the exact words that I used yesterday?

Q. No, I am not purporting to give you the exact words. I am giving you the substance of your testimony as I recall it and I am asking you if you don't recall that you so testified.

A. I think I testified that when barges were in tow that there were lifesaving equipment aboard the vessel. As to whether it was on the barges, I don't recall whether I said all or not.

Q. You don't recall whether you testified to that effect or not?

A. But I do recall saying there would be lifesaving equipment on the barge—on the vessel, on the boat.

Q. You have pointed out in these exhibits about which you have testified on direct examination a number of barges, five or six I believe, which contained life rings or which show in these pictures life rings. I would like to ask you to examine this picture in the same book which is marked as Defendant Number 2's Exhibit 5-A, and I will ask you [fol. 523] if it is not true that there are no life rings upon the barges shown in that picture so far as the picture discloses.

The Court: I think, Mr. Johnson, that the picture will speak for itself and you may assume, if it is true, that the picture shows no life rings and go on to the next.

* * * * * * * *

By Mr. Johnson:

Q. I will ask you if those are not cargo barges.

A. Some are. They are cargo barges, yes, sir.

Q. Can you tell from that picture where they are?

A. This would be a cargo barge, a covered type cargo barge. That is what you mean, a deck type. This would be a deck type cargo barge, and so is this one.

Q. You are talking about the barges in the foreground of the picture?

A. The barges in the foreground of the picture, and I would assume that this barge is owned by the Ashland Oil

and Refining Company. This here would be a cargo deck barge.

[fol. 524] Q. Can you tell on what river those barges are?

A. At this particular time?

Q. Yes.

A. No, sir, because I see no water or banks.

Q. Do you know where they operate, those barges in that picture?

A. Anywhere. They could be anywhere on the Ohio or Mississippi Rivers or possibly on the Kanawha River.

Q. Next I refer you to Defendant Number 2, Exhibit 5-B and ask you what those barges are as shown in that picture or in those pictures.

A. This here, this barge here is a tank barge, deck level type, a deck type.

Q. Isn't that barge very similar to the CC-204? That is the barge, pictures of which you were shown in connection with this case.

A. It is, yes, sir. It is similar.

Q. Same type of barge?

A. It is the same type of barge with the exception of the CC-204, I believe, has two pipelines out through the middle, where this only has a single one.

Q. Here on the starboard side of the tow there is another similar barge, is there not?

[fol. 525] A. Yes, sir.

Q. And here in front of the barge on the port side there is another similar barge?

A. Yes.

Q. And in the middle here is a different type of tank barge?

A. Yes.

Q. And forward of that is a hopper barge?

A. Yes, sir.

Q. And at the starboard is the hopper barge, a cargo barge with a roof over it?

A. Covered top, yes, sir.

Q. I will then direct your attention to the opposite page and that is marked as Exhibit 5-C. The barges in the foreground there are tank barges of a different type, are

they not, that is, different from the barge involved in this case?

A. Yes, sir, they are.

Q. But tank barges nevertheless?

A. But tank barges, yes, sir.

Q. And forward—I won't go into that. It is so hazy you can't see what is forward. I direct your attention to Exhibit 5-D and ask you if the barges shown in that picture are not tank barges of the type very similar to the [fol. 526] one involved in this case.

A. This barge would be with the exception of this tank here. I don't think the CC-204 has—

Mr. Love: I can't hear him.

The Witness: I don't think the CC-204 has such a tank on deck.

The Court: As you go through looking at these barges I think it would be well if you see in any of the pictures any indication of life rings or any other safety equipment being on the barges, that you should mention that.

Mr. Johnson: Yes.

Q. Can you tell from the picture where that picture was taken, which river or which portion of the river?

A. I couldn't tell you the portion but I would assume it is on the Mississippi River.

Q. You assume by the breadth of the river and the flat banks?

A. By the breadth and flat banks, yes, sir.

Q. Now, I direct your attention to a picture that has been marked as our Exhibit 5-D and I will ask you what type of barge this is, a portion of which is shown in the foreground.

A. This one here?

Q. Yes.

[fol. 527] A. This would be a sand barge.

Q. Right behind that appears to be a tank barge.

A. Yes, sir.

Q. And behind that there is an assortment of different types of barges of a considerable number.

A. Yes, sir.

Q. Can you tell where that picture is taken?

A. That picture is taken, I believe, on the Ohio River. This boat coming here is either the Charles T. Campbell or the John W. Hooker.

Q. Directing your attention to a picture that has been marked 5-E, that evidently shows a flotilla of hopper barges. Is that correct?

A. Yes.

Q. Can you tell me where that picture was taken?

A. That picture was taken at Emsworth Lock on the Ohio River.

Q. Now I direct your attention to Exhibit 5-F and I will ask you what those barges are, what that picture shows.

A. This picture shows the barge being loaded with pipe and this barge, I believe, would either be—I would assume that that would be fluorspar. That is used in the mills. It comes from the Ohio River down near Cave and Rock or Rosa Clair.

[fol. 528] Q. Those four barges are what are called hopper barges?

A. Yes, sir.

Q. And that was on what river did you say?

A. The Ohio River.

Q. Turning to the Plaintiff's Exhibit 15-D, about which you have already testified, how many barges are there in that flotilla?

A. There are twelve.

Q. And the life rings which were circled and about which you testified appear on only two out of those twelve barges?

A. Those are the only two life rings that show up in this picture.

Q. Well, that's what I mean. Now, those barges are all tank barges but of different types, isn't that true?

A. That's true.

Q. Incidentally, is that the famous Sprague?

A. Yes, sir.

Q. Which was the biggest towboat on the river?

A. Stern-wheeler, yes, sir.

Q. On Exhibits 5-H and 5-I, which are opposite each other in the book, I will ask you what type of barges are shown in the picture, in those pictures.

A. We have covered top cargo barges in both pictures. [fol. 529] Q. And in the background of 5-H there are some coal hopper barges, isn't that true?

A. Yes, sir.

Q. And in the background of 5-I there are some coal hopper barges and a covered cargo barge.

A. Yes, sir.

Q. And where were those pictures taken?

A. At Weirton, West Virginia.

Q. Both of them?

A. Yes, sir.

Q. Now, I direct your attention to Exhibit 5-K, which appears to show a flotilla of tank barges with perhaps one or two smaller barges of another type. Is that correct?

A. Yes, sir, several tank barges.

Q. Can you tell where that picture was taken, that is, on what river?

A. It was taken on the Ohio River.

Q. Now, directing your attention to Exhibit 5-L, there are a number of coal hopper barges shown in that picture. Is that right?

A. Yes, sir.

Q. Can you tell me how many in that tow?

A. I don't know whether this is a coupling or a shadow. [fol. 530] There would be eight or possibly ten and a fuel flat and a pump boat.

Q. Can you tell on what river that picture was taken?

A. On the Kanawha River.

Q. Can you tell where on the Kanawha River?

A. There is bends similar to that on the Kanawha River.

Q. But you do feel reasonably certain it was on the Kanawha?

A. Yes, sir.

Q. Directing your attention to Exhibit 5-M, that purports to show a tank barge in the foreground. Is that correct?

A. Yes, sir.

Q. And beyond that there are a number of other tank barges in the background?

A. Yes.

Q. And some open hoppers to port and starboard, is that right?

A. Yes, sir.

Q. Can you tell where that picture was taken?

A. That was taken at Gallipolis Dam.

Q. Now, I direct your attention to Exhibit 5-N, which appears to show a number of tank barges and open hopper barges, and ask you if you can tell where that picture was taken.

[fol. 531] A. At Gallipolis Lock.

Q. That is the same place 5-M was taken?

A. Same place.

Q. In fact, it appears that the barges are the same.

A. Same tow, yes, sir.

Q. Directing your attention to 5-O, it appears that there are two or more open hopper barges shown in that picture lying astern of the barge which cannot be identified. Do you agree with that?

A. Yes, sir.

Q. Can you tell where that picture was taken?

A. No, I can't.

Q. Directing your attention to Exhibit 5-P, there are a very large number of barges of different kinds shown in that tow, are there not?

A. Yes, sir.

Q. What kind of a barge is that in the left foreground?

A. That's a tank barge.

Q. And what kind of a barge is that in the right foreground?

A. A tank barge.

Q. Can you tell where that picture was taken?

A. It was taken somewhere up on the upper Ohio River [fol. 532] near Pittsburgh around Aliquippa.

Q. Now, in conclusion, directing your attention to Exhibit 5-Q, what kind of barges are shown in that picture?

A. They are a covered type of cargo barge where the tops roll back from the center back to each stern and bow.

Q. Can you tell on what river that picture was taken?

A. No, sir.

Q. That from the picture looks like it might be on the high seas, doesn't it?

A. It could be.

. . . . . .

[fol. 534]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was [fol. 535] being used.

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition

to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years; and in arriving at that [fol. 536] figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

I think that the present worth of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is

$3600, all of which added together produces a total of [fol. 537] $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of the Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

On the question of contributory negligence my conclu- [fol. 538] sion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of them close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

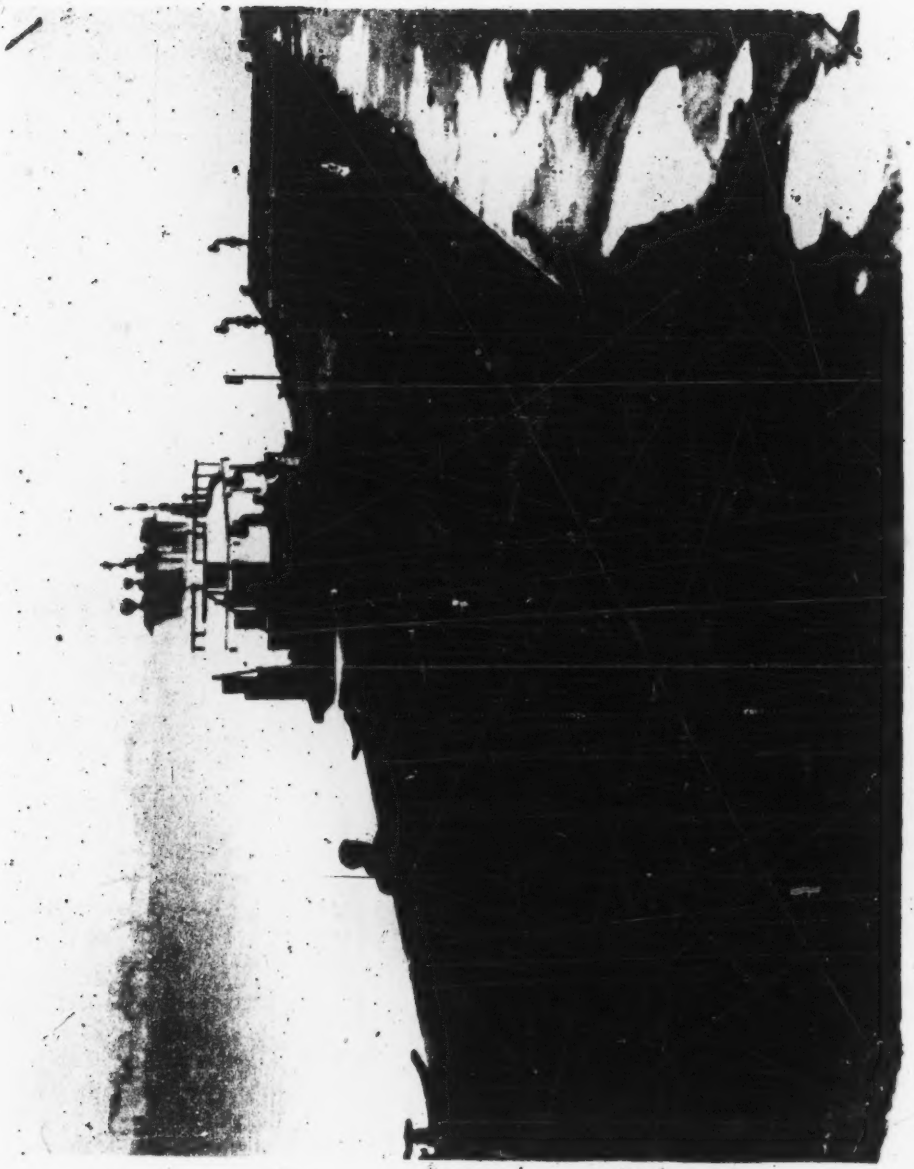
As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume

the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon [fol. 539] Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

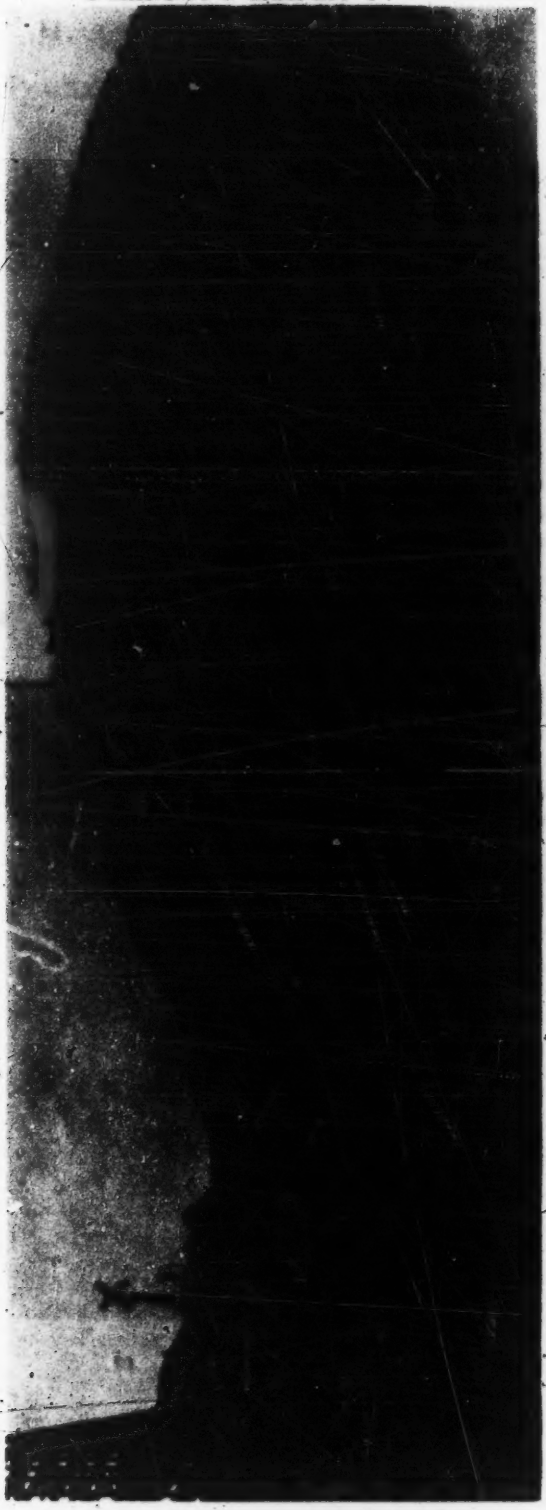
* * * * * * *

[fol. 547] Reporter's Certificate to foregoing transcript (omitted in printing).



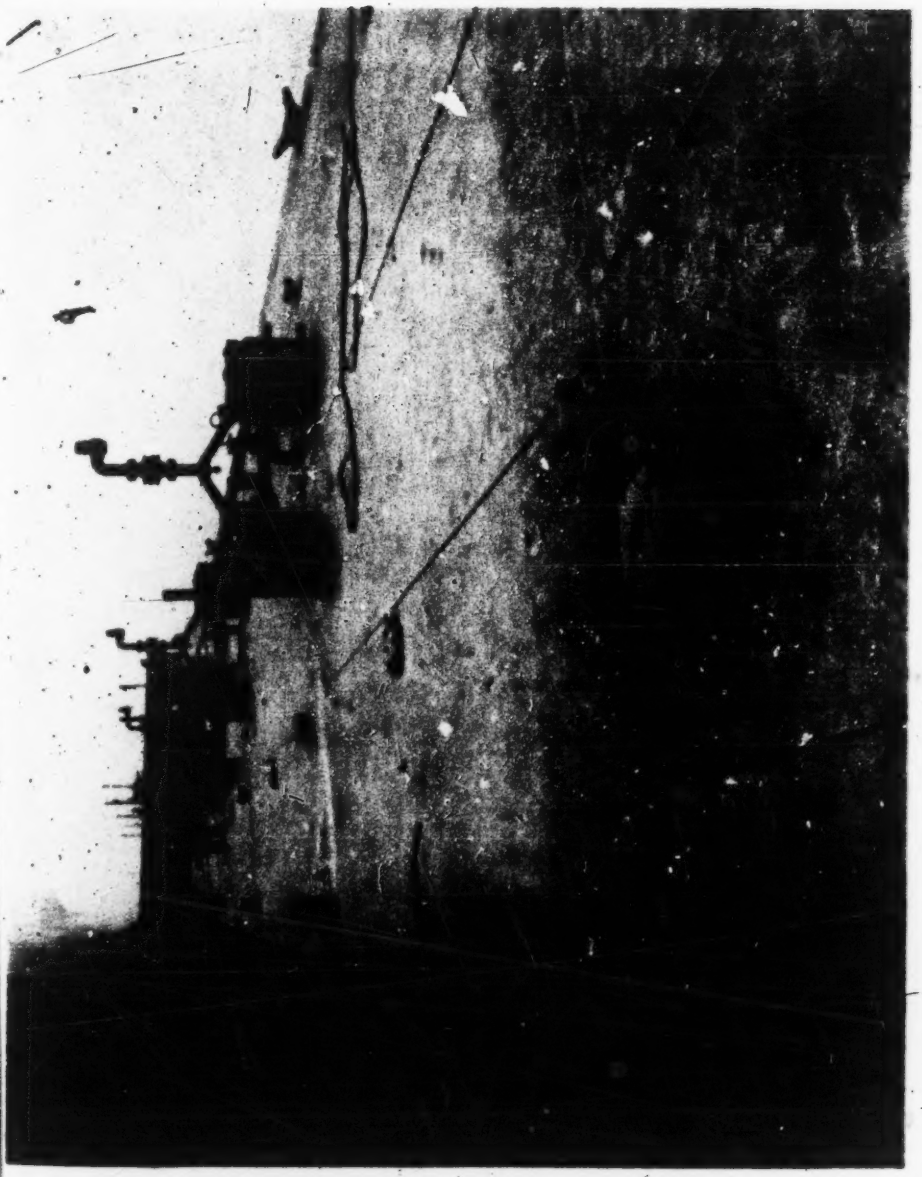
[fol. 552]

PLAINTIFF'S EXHIBIT 5.



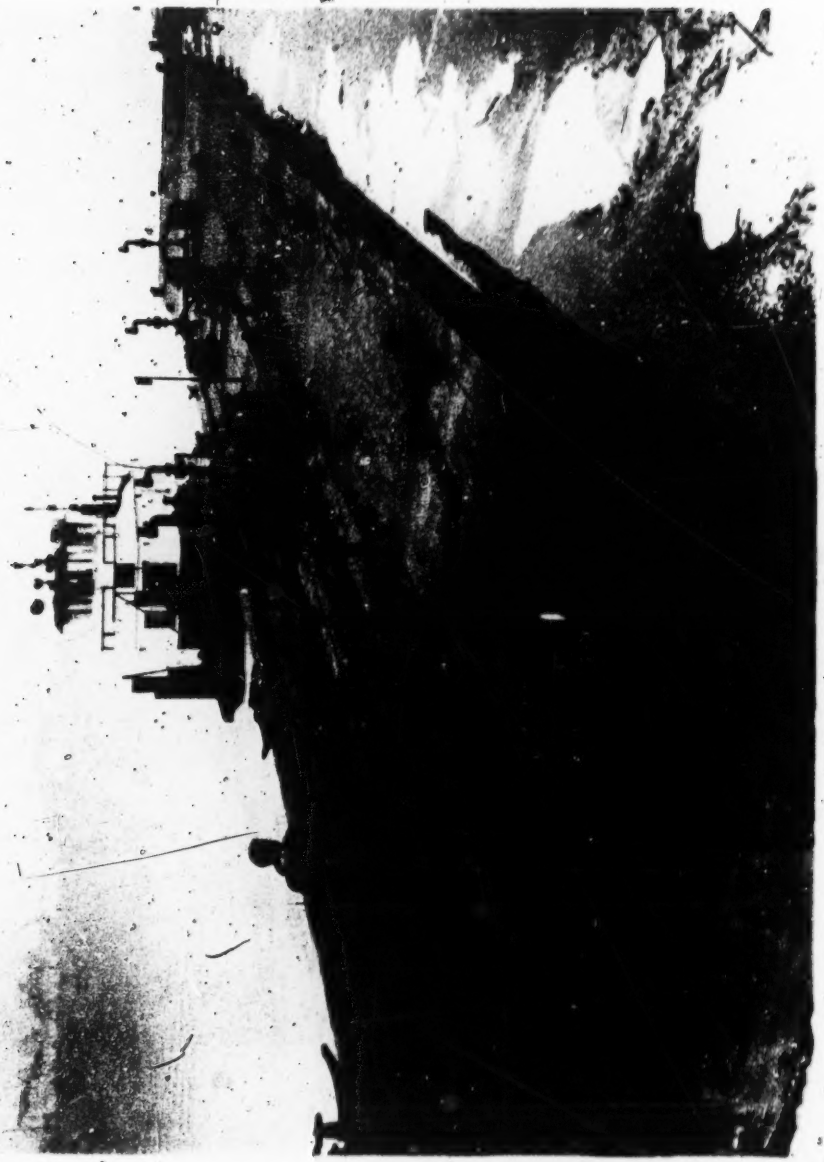
[fol. 553]

PLAINTIFF'S EXHIBIT 6



[fol. 554]

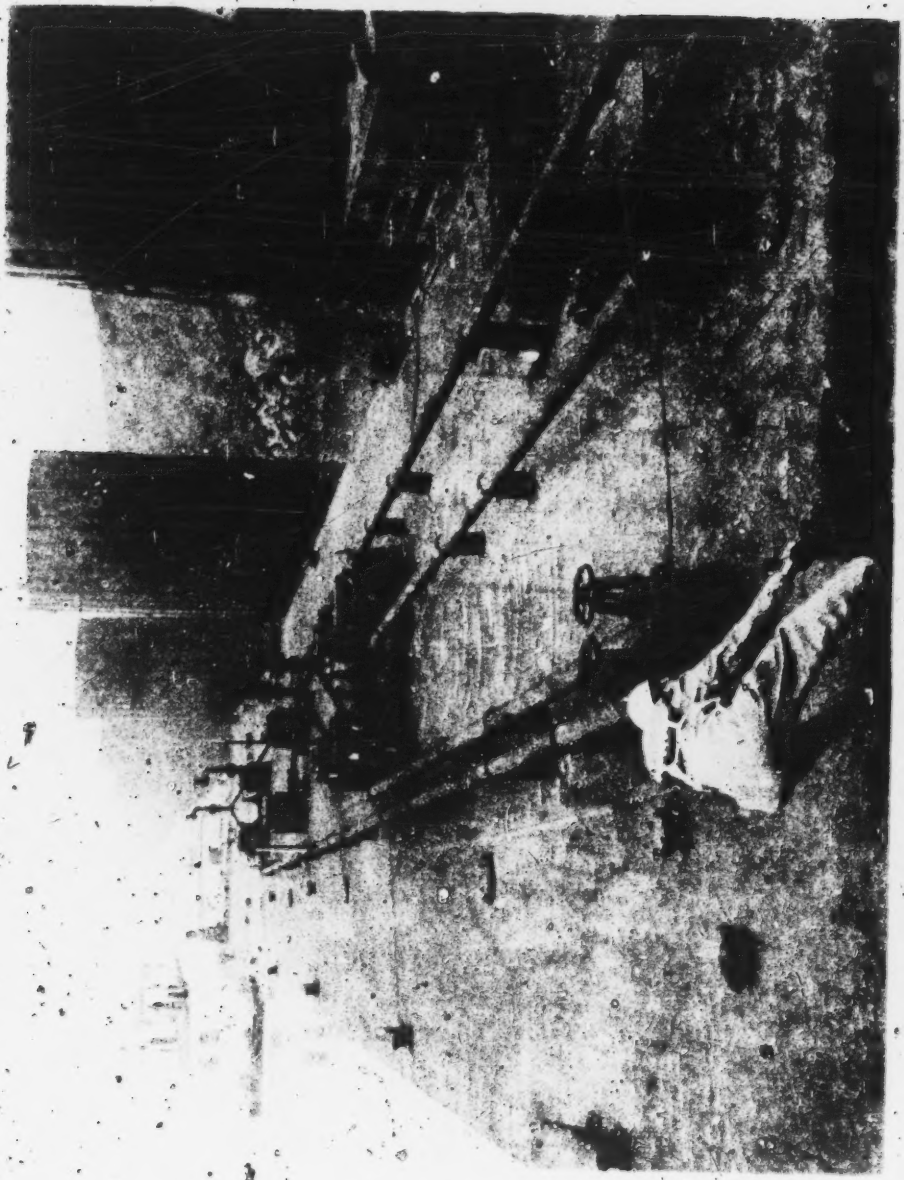
PLAINTIFF'S EXHIBIT 7



[fol. 555]

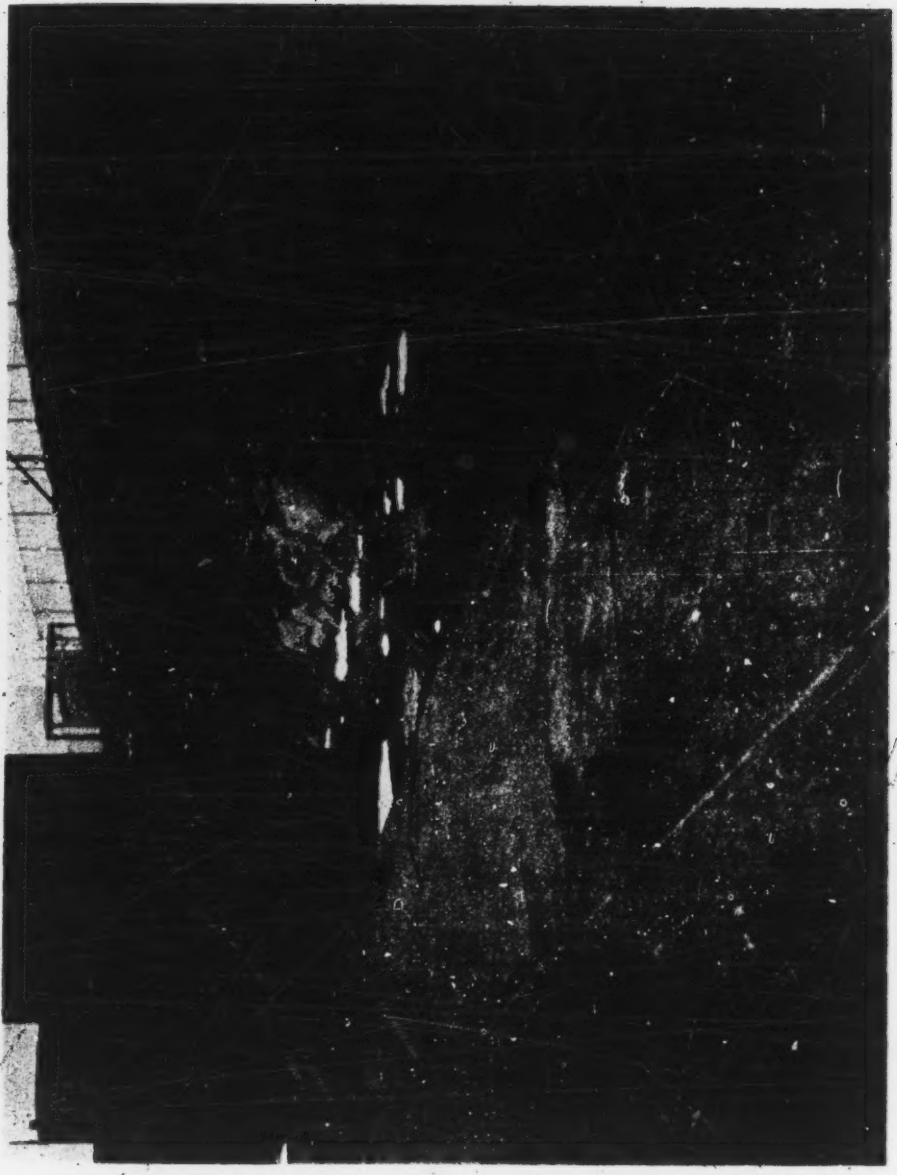
PLAINTIFF'S EXHIBIT 8

PLAINTIFF'S EXHIBIT 9



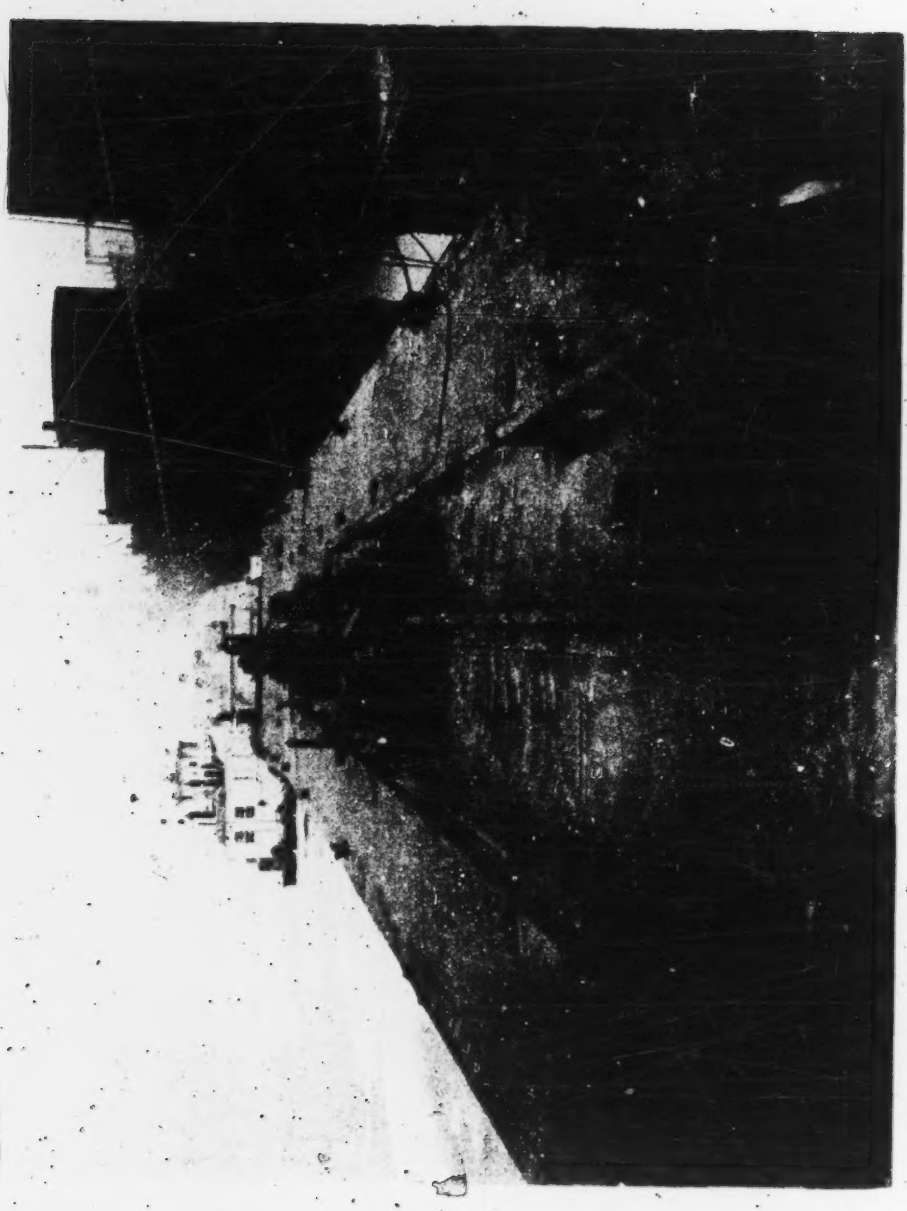
[fol. 557]

PLAINTIFF'S EXHIBIT 10



[fol. 558]

PLAINTIFF'S EXHIBIT 11



[fol. 559]

PLAINTIFF'S EXHIBIT 12

CARBIDE AND CARBON CHEMICALS COMPANY
A DIVISION OF UNION CARBIDE AND CARBON CORPORATION
P. O. Box 8004, South Charleston 3, West Virginia

PURCHASE ORDER
314- 83285

MAIL INVOICE IN DUPLICATE, BILL OF LADING AND SHIPPING NOTICE TO ABOVE ADDRESS UNLESS OTHERWISE INDICATED BELOW

MAIL CERTIFIED STATEMENT HERE TO GENERAL ACCOUNTING DEPT., ROOM 2000, 30 E. 42ND ST., NEW YORK 17, N. Y.

THE ABOVE PURCHASE ORDER NUMBER SHOULD APPEAR ON ALL PACKAGES, INVOICES AND B/L PERTAINING TO THIS PURCHASE ORDER.

Amherst Barge Co.

Reed, W. Va.

Plaintiffs Ex. No. 12
For Identification
Filed
Case

DATE OF ORDER
10-12-55

PAGE 1 OF

WE HEREBY ORDER SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND THOSE PRINTED ON THE REVERSE SIDE HEREOF

DATE TO BE SHIPPED BY 10-15-55		F. O. B.	Point	Dept.	Seller's Dock
TRANSPORTATION TERMS	Acct. of Buyer X	Acct. of Seller Transp. Prepaid			
SHIP VIA	Parcel Post	Truck Frt.	Rail Frt.	Dlvy. Exp.	Our Tow
TERMS OF PAYMENT	Due On Date X				

NOTE: "Where transportation is for account of Buyer on shipments subject to Rule 15(2)(C) of Uniform Freight Classification No. 3, tariff number Item 33440 of National Motor Classification Nos. 12 and A3 (Local), or successive issues thereof, the released value of the shipment shall be released on the bill of lading at not exceeding 50 cents per pound or the amount prescribed in such Items."

SPECIAL SHIPPING INSTRUCTIONS

ITEM NO.	BUYER'S ACCOUNT NUMBER	QUANTITY	DESCRIPTION	PRICE
1	740-885-0-9204	1	To cover cost of labor and material for Sand Blasting and Painting our Barge CC 204.	Approx. $2,247.00 net lot
2	"	1	Gas Free Certificate.	Price Advise
3	"	1	Minor Repairs.	Price Advise

Note 1: Buyer will furnish necessary Dimetcote #3 and D-3 Curing Solution.

Note 2: Barge will be delivered to your dock by our tow.

Note 3: Notify Buyer when work is completed so our tow may be dispatched for Pick Up.

Refer to your quotation dated 9-14-55.

E. A. Graham

ADDRESS ANY QUESTIONS RELATIVE TO THIS ORDER TO

PLEASE ACKNOWLEDGE ACCEPTANCE OF THIS ORDER AND ADVISE WHEN SHIPMENT WILL BE MADE OR WORK PERFORMED

J R Cuccaro
WORKS PURCHASING AGENT
M. W. White

SPO 55-17-10-52

[fol. 559a]

TERMS AND CONDITIONS

QUALITY: Seller warrants that the goods will conform to description and specifications and will be free from all defects in material and workmanship. Buyer shall have the right to inspect and test any goods before acceptance if such inspection and test are made within a reasonable time or as provided in the specifications. Seller shall pay the cost of inspecting and testing of goods rejected and all transportation charges thereon.

QUANTITY: Goods shipped in excess of quantity designated in Formal Purchase Order may be returned at Seller's expense.

PRICE: In case the price specified herein includes the payment or allowance of any transportation charges by Seller, Buyer shall be charged with any increase or credited with any decrease in such transportation charges caused by changes in the rates for such transportation in effect at the date hereof.

DELIVERY: Each package shall be numbered and labelled with Buyer's order number, stock number, contents and weight; shall contain an itemized packing slip and shall be properly packed for shipment. No charges will be allowed for packing, cartage, freight, express or carriage unless specified on the face hereof. Time is of the essence hereof and if any goods are not delivered within the time specified on this purchase order or within a reasonable time if no time is so specified Buyer may refuse to accept such goods and may cancel this agreement.

INVOICES: Invoices shall (a) be rendered separately for each delivery; (b) cover not more than one order; (c) be rendered with order number or noted thereon. If invoice is subject to cash discount the discount period will be calculated from the date the invoice is received by Buyer. Where shipments are made from the United States into Canada, or vice versa, certified Customs Invoices in triplicate must be supplied, in addition to the regular commercial invoices, and forwarded immediately after shipment to Buyer. All monthly statements shall be mailed to Buyer at its main office, No. 30 East 42nd Street, New York City, marked for attention of General Accounting Department, Room 227.

PATENTS: Seller shall protect and indemnify Buyer from and against all claims, damages, judgments, expenses and loss arising from infringement or alleged infringement of any patent of the United States or, if shipment is to be made into Canada, of any patent of Canada, by any of the goods delivered hereunder, but Seller does not warrant against infringement by reason of the use thereof in combination with other materials or in the operation of any process, and Seller shall defend or settle at its own expense any suit or proceeding brought against Buyer for such infringement, provided that Seller is notified promptly in writing of the commencement of such suit or proceeding and is given authority, information and assistance by Buyer for the defense or settlement thereof.

INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert or other employee connected with or employed by Seller, and Seller agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such services shall not be deemed to be the agent or employee of Buyer, and Seller assumes full responsibility for his acts and omissions and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935.

INSURANCE: If this agreement provides for work to be performed by Seller on property owned or controlled by Buyer, or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liability and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be given to Buyer at least five (5) days prior to the effective date of such cancellation.

CONTINGENCIES: Neither party hereto shall be liable to the other for default or delay in delivering or accepting goods hereunder if caused by fire, strike, riot, war, act of God, delay of carriers, governmental order or regulation, complete or partial shut down of plant by reason of inability to obtain sufficient raw materials or power and/or any other similar or different contingency beyond the reasonable control of the respective parties.

DRAWINGS, ETC.: All drawings, blue prints, sheet patterns, tools, printing plates, etc., prepared or constructed by Seller and paid for by Buyer shall be the property of Buyer, and upon completion of deliveries hereunder, or upon termination of this agreement, shall be delivered to Buyer.

GOVERNING LAW: The interpretation and performance of this agreement shall be governed by the law of the State of New York and the provisions of this agreement shall be subject to all applicable laws and regulations of the Federal Government.

FAIR LABOR STANDARDS ACT: Seller hereby agrees that the goods will be produced in compliance with all applicable requirements of sections 6, 7 and 12 of the Fair Labor Standards Act, as amended and of Regulations and Orders of the U. S. Dept. of Labor issued under Section 15 thereof and agrees to so certify on its invoices if so directed by a stamp placed on the face of this purchase order.

OTHER TERMS: Any different terms or conditions in Seller's acknowledgment of this purchase order are not binding on Buyer unless accepted in writing by Buyer and shipment of goods pursuant to this purchase order shall be deemed to be an acceptance by Seller of the Terms and Conditions of this purchase order.

[fol. 560]

PLAINTIFF'S EXHIBIT 13

SPECIFICATIONS

PAINTING OF BARGE CC #204

Plaintiff's Ex. No. 13
For Identification
Filed
Case No.

GENERAL

The bottom and sides of subject barge are to be coated with an experimental zinc-lead inorganic coating named Dimetcote-3 and which is manufactured by The Amercoat Corporation. This coating has been described as a "Cold-galvanizing" process. The deck and Boot Top are to be coated with the standard paint for barges, "Yankee-Clipper". The applications of Dimetcote-3 and the "Yankee-Clipper" are to be made by The Amherst Barge Company of Reed, West Virginia. The Amercoat Corporation is to be represented by Mr. William Morrow, Sales Engineer, who will furnish advise as to the application procedure for the Dimetcote.

DETAILS

PART A- BOTTOM AND SIDES

All areas of the bottom and sides (including those of the rakes and the fore and aft headlogs) up to the level of the deck are to be coated per the standard procedure specifications of The Carbide and Carbon Chemicals Company and the recommendations of The Amercoat Corporation.

SURFACE PREPARATION - All areas for PART A, as described above, are to be blast cleaned to a No. 1 Commercial Quality Finish as defined in the following. All old paint, dirt, grease, rust, mill scale, corrosion products, etc. are to be completely removed. Following this operation all loose dirt, sand, etc. are to be removed by brushing off or blowing off the surfaces with clean dry air.

COATING APPLICATION

1. Apply Dimetcote-3 Coating per the standard Carbide and Carbon Chemicals Company attached and according to the advice of The Amercoat Corporation representative.

   Final dry film thickness shall be two (2) mils minimum and shall average two (2) to three (3) mils.

PART B-DECK AND BOOT TOPPING

The area to be coated in PART B of these specifications shall include all of the deck, the head logs (fore and aft) and the Boot Top which

[fol. 560a]

PART B -- DECK AND BOOT TOPPING (Continued)

is to extend downward from the deck for a distance of one and one half feet on each side of the barge.

NOTE: The work on PART B shall be performed only after the sides are coated with Dimetcote-3, as per PART A.

SURFACE PREPARATION

The deck area only is to be blast cleaned to a "Brush-Off" Quality Finish. This work is defined to mean that all loose rust, loose mill scale, loose paint, dirt, grease, etc. are to be removed.

NOTE: Do not blast the Boot Top area.

PAINT APPLICATION

.....gray coats of "Tankoo-Clipper" paint.

J. L. Barker
Coatings Engineer
Works Engineering Department

JLB/gA
September 30, 1955

[fol. 560b]

REX G. BUCKLEY
2545 Spring Street
South Charleston 3, W. Va.

GAS CHEMIST'S CERTIFICATE

Vessel: [illegible]
Type Vessel: Compartment Barge
Location: Kenova, W.Va.
Owner or Agent: Carbide & Carbon Chem.
Survey Requested by: Ashcroft Barge

Test Method: Davis Vaporometer
Last Cargo: Isopropanol
Date: 2 October 1955
Time of Completion: 10:30 AM
Certificate No. 27

[illegible] is an all welded steel barge having eight cargo compartments and two pump compartments.

This barge is SAFE FOR MEN - SAFE FOR FIRE. Adequate ventilation is to be provided to all compartments in which men are working.

STANDARD DESIGNATIONS:

1. SAFE FOR MEN - SAFE FOR FIRE: In the compartment so designated and in the adjacent compartments unless inerted, the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the presence of fire.
2. SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the absence of fire.
3. NOT SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is not within the permissible limits of the Standards or that, in my judgment, the residues are capable of producing dangerous gases under atmospheric conditions or that the compartment was not tested by me.

CHEMIST'S ENDORSEMENT:

This is to certify that I have examined the compartments noted in the foregoing list for cleanliness and have tested the atmosphere in each for gas content, and at the time of the inspection noted above found them to be as indicated in accordance with the STANDARDS FOR THE CONTROL OF GAS HAZARDS ON VESSELS TO BE REPAIRED adopted by The American Bureau of Shipping and National Fire Protection Association.

This certificate is based on conditions existing at the time the inspection herein set forth was completed. Transfer of ballast or manipulation of valves or closure equipment tending in my opinion to alter conditions in pipe lines, tanks or compartments subject to gas accumulation, or transfer of the vessel, unless specifically approved in this certificate, requires inspection and endorsement or reissue of certificate for the spaces so affected.

Signed: Rex G. Buckley

Certificate No. CC [illegible]

[fol. 560c]

COMPARTMENT BANK CC-20

INSPECTION PRIOR TO REPAIRS

DATE INSPECTED: 10-7-55

WHERE INSPECTED: Amherst Barge Company

IN OR OUT OF WATER: Out of water on marine ways

REASON FOR INSPECTION: Biannual drydocking, Coast Guard inspection, painting, and repair

INSPECTED BY: F. C. Pritchard

COAST GUARD INSPECTIONS REQUIRED: ANNUAL _____, BIENNIAL DRYDOCKING X

LIST OF WORK REQUIRED:

GAS FREE: By C & GSC

GAS FREE CERTIFICATE: By ship yard

DRYDOCK AND LAY DAYS: For owner's account

CLEANING AND PAINTING

HULL EXTERIOR: Apply "Bitotoxo - 3" and "Yankee Clipper" per specifications, dated September 30, 1955 prepared by Mr. J. L. Baxter

MARKINGS AND SIGNS

	Paint
Draft Marks:	*
Barge Number All Corners:	*
"Port Of South Charleston", on Opposite Corners:	*
Identification Sign on Deck or Cargo Piping:	*
Warning Sign:	*
Red Flag:	*
Compartment Nos. on expansion trunks	*

BOW RAKE INTERIOR:
Clean and apply "No-corode A Special" grease up to 2' - 0" level as required. Apply hot.

STERN RAKE INTERIOR:
Same as bow rake.

[fol. 560d]

VILLAGE OPENINGS (Screens, Gaskets, Hinge Bars, Etc.):
Renew all gaskets with neoprene

PRESSURE VACUUM RELIEF VALVES:
Open and inspect

FIRE EXTINGUISHERS:
Weigh both extinguishers

TESTING:
(To Be Witnessed or Approved By U.S.Coast Guard Inspector)
Apply 2 psi air pressure and test for leaks with soapsuds as follows:
Apply this to all product compartments and check all repair welds and tightness of new Butterworth openings.
Install ground wire -

Check following welds for leakage by application of water hose test:

1 - S Compartment
Tighten stem raising device in yoke of unloading valve for this compartment. Reweld No. 6 side longitudinal to No. 1 transverse truss

ADDITIONAL WORK:

1 - S Compartment
Tighten stem raising device in yoke of unloading valve for this compartment
Reweld No. 6 side longitudinal to No. 1 transverse truss.
No. 6 & 7 side longitudinal to No. 3 transverse truss

2 - P Compartment
Reweld No. 5 side longitudinal to No. 1 transverse truss.

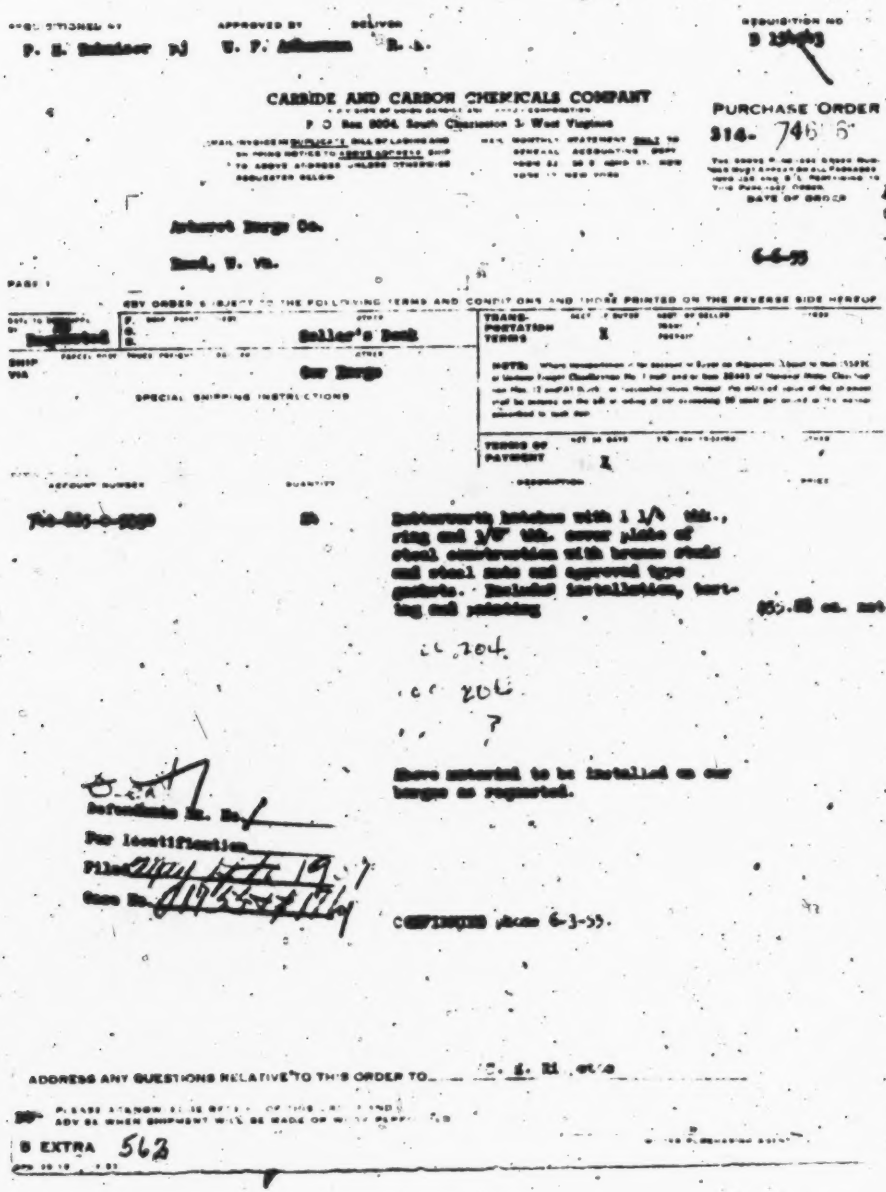
2 - S Compartment
Reweld Nos. 5, 6, and 7 side longitudinals to No. 2 transverse truss.
Grop and renew a section 12" x 3/8" x 1[illegible]" of gunwale located approximately 9' forward of bulkhead.

2 - P Compartment
No repairs required

3 - S Compartment
Reweld Nos. 6 and 7 side longitudinals to No. 3 transverse truss.
Reweld Nos.3 side longitudinals to No. 4 transverse truss.

[fol. 562]

DEFENDANT'S No. 1—EXHIBIT 1



P. E. Schindler NJ W. P. Adkerson B. A.

REQUISITION NO. B 15[illegible]

CARBIDE AND CARBON CHEMICALS COMPANY

P. O. Box 8004, South Charleston 3, West Virginia

PURCHASE ORDER

314- 746 6

DATE OF ORDER

Ashcraft Barge Co.

Kenova, W. Va.

6-6-55

PAGE 1

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND THOSE PRINTED ON THE REVERSE SIDE HEREOF

Seller's Dock

Our Barge

SPECIAL SHIPPING INSTRUCTIONS

TRANSPORTATION TERMS: X

TERMS OF PAYMENT: X

ACCOUNT NUMBER | QUANTITY | DESCRIPTION | PRICE

74-[illegible]-0-2000 | lb. | Interwrought bronze with 1 1/4 thk., ring and 1/8" thk. cover plate of steel construction with bronze studs and steel nuts and approved type gaskets. Included installation, testing and painting | $[illegible] est. net

cc 204

cc 206

" 7

Above material to be installed on our barges as requested.

Defendants Ex. No. 1

For Identification

Filed April 17th 1957

Case No. 4104 Civil

CONFIRMING phone 6-3-55.

ADDRESS ANY QUESTIONS RELATIVE TO THIS ORDER TO C. E. Bl[illegible]

PLEASE ACKNOWLEDGE RECEIPT OF THIS ORDER AND ADVISE WHEN SHIPMENT WILL BE MADE OR WHEN PERFORMED

B EXTRA 562

[fol. 563]

DEFENDANT'S NO. 1—EXHIBIT 2

REX G. BUCKLEY
2545 Spring Street
South Charleston 3, W. Va.

GAS CHEMIST'S CERTIFICATE

Vessel: CC-204
Type Vessel: Compartment Barge
Location: Reed, W.Va.
Owner or Agent: Carbide & Carbon Chem.
Survey Requested by: Amherst Barge

Test Method: Davis Vapotester
Last Cargo: Isopropanol
Date: 2 October 1955
Time of Completion: 10:30 AM
Certificate No. 37

CC-204 is an ann welded steel barge having eight cargo compartments and two rake compartments.

This barge is SAFE FOR MEN - SAFE FOR FIRE. Adequate ventilation is to be provided to all compartments in which men are working.

Defendant's Ex. No. 2
For Identification
Filed
Case No.

STANDARD DESIGNATIONS:

1. SAFE FOR MEN - SAFE FOR FIRE: In the compartment so designated and in the adjacent compartments unless inerted, the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the presence of fire.
2. SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the absence of fire.
3. NOT SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is not within the permissible limits of the Standards or that, in my judgment, the residues are capable of producing dangerous gases under atmospheric conditions or that the compartment was not tested by me.

CHEMIST'S INDORSEMENT:

This is to certify that I have examined the compartments noted in the foregoing list for cleanliness and have tested the atmosphere in each for gas content, and at the time of the inspection noted above found them to be as indicated in accordance with the STANDARDS FOR THE CONTROL OF GAS HAZARDS ON VESSELS TO BE REPAIRED adopted by The American Bureau of Shipping and National Fire Protection Association.

This certificate is based on conditions existing at the time the inspection herein set forth was completed. Transfer of ballast or manipulation of valves or closure equipment tending in my opinion to alter conditions in pipe lines, tanks or compartments subject to gas accumulation, or transfer of the vessel, unless specifically approved in this certificate, requires inspection and endorsement or reissue of certificate for the spaces so affected.

Signed: Rex G Buckley
Certificate No. CC 43

[fol. 564]

DEFENDANT'S NO. 1—EXHIBIT 3

Form No. V 3-1912

CERTIFICATE AMENDING CERTIFICATE OF INSPECTION BY CHANGING CHARACTER OF VESSEL, ROUTE, EQUIPMENT, ETC.

UNITED STATES COAST GUARD

MARINE INSPECTION OFFICE

PORT OF HUNTINGTON, WEST VIRGINIA

DATE 26 October 1955

This certifies, That the following-described amendments are hereby authorized in the certificate of inspection expiring on 2 APRIL, 1956, issued to the tank barge (Steam, motor, sail, or barge) vessel named CO-2th Off. No. - - of 593 gross tons, home port SOUTH CHARLESTON, WEST VIRGINIA classed as TANK BARGE (Passenger, freight, etc.) built at KEWAUNEE ISLAND in the State of PENNSYLVANIA, in the year 1948, and certificated at HUNTINGTON, in the State of WEST VIRGINIA namely:

VESSEL DRYDOCKED AT REED, WEST VIRGINIA

13 OCTOBER 1955

2-year survey completed
Subd. "F" Sec. 31.1-20 (a) (2)

W. E. FULLER, CHR., USCG
Acting Officer in Charge, Marine Inspection.

The original of this certificate will be delivered to the master or owner of the vessel to which it relates, which certificate must be framed under glass and posted on board near the certificate of inspection or examination, if the certificate of inspection or examination is required to be posted; or kept on board with the original certificate of inspection or examination, if the certificate of inspection or examination is not required to be posted, to be shown on demand.

One copy of this certificate will be delivered to the chief officer of customs of the district in which the copy of the original certificate of inspection or examination was filed.

One copy of this certificate will be filed with the copy of the certificate of inspection or examination that it amends in the office of the Officer in Charge, Marine Inspection.

Any additional equipments required must be stated herein.

[fol. 565]

DEFENDANT'S No. 1—EXHIBIT 4

FILE NO. 79 1958

This Certificate Expires 1 April, 1938

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL SC-206 OFFICIAL NO. [illegible]
CLASS Sea Going TONS: GROSS 325 NET 209 LENGTH 105'
HOME PORT South Charleston, West Virginia OWNERS Carbide & Carbon Chemicals Company
OPERATORS Carbide & Carbon Chemicals Company, Inc. of Union Carbide & Carbon Corporation, Charleston, W. Va.

The inspection of the above-named vessel having been completed at South Charleston, West Virginia on the 1st day of April, 1938, I hereby CERTIFY that the said vessel was built at [illegible] Sherrills Island in the State of Pennsylvania, in the year 1918, rebuilt in the year —; that the hull is constructed of steel; is provided with — stateroom, — berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder; and is allowed to carry — passengers, — persons in addition to the crew.

The following complement of licensed officers and crew is required to be carried, included in which there must be — certificated lifeboatmen: UNMANNED

— Master	— Second Mate	— Able Seamen	— Chief Engineer	— Pursers/Stewardesses
— 1st Class Pilot	— Third Mate	— Ordinary Seamen	— 1st Assistant Engineer	— Others
— 2d Class Pilot	— Second Mate	— Watchmen	— 2d Assistant Engineer	— Watchmen/Firemen
— Chief Mate	— Radio Officer	— Firemen	— 3d Assistant Engineer	

and also may carry — persons whom needed in the steward's and other departments not connected with the navigation of the vessel. Total number of persons allowed —

[illegible] Master Rt. No. [illegible]
[illegible] Identification

The said vessel is permitted to be navigated for one year on RIVERS INLAND WATERS EXCEPT THE GULF OF MEXICO

— Master Unlimited for — persons	— Fire extinguishers, Class A —	Stability letter dated 29 May 1933	— Number — Year built
— Mate Unlimited for — persons	1 Fire extinguishers, Class B 12	Date stability letter dated 29 May 1933	— Kind
— Mate Limited for — persons	— Fire extinguishers, Class C —	Propelled by —	— Whether officers or seamen inspected
— Engineer Unlimited for — persons	— Fire extinguishers, Semiportable —	Tail shaft taper —	— Draft — Depth
— Engineer Limited for — persons	— Fire extinguishers, Portable —	—	— Owned by —
— Lifeboats for — persons	— Fire extinguishers, Fixed —	Pressure vessels examined —	— Boarding vessel
— Seagoing apprentices for — persons	— Gun —	—	— Boarding vessel
— Life preservers, adult's —	—	—	—
— Life preservers, children's —	—	Fuel —	— Date hydrostatic pressure applied
— Wood floats —	— Fire axes — Fire pumps —	—	— Maximum steam pressure allowed
— Oars, Non-Sparking appearance —	Fire hose and length required by law — Number — Length —	—	—
—	"A" Jack to extend only FWD and lower strake	—	—
—	—	—	—
—	Capacity in barrels 5,400	—	—

STATE OF WEST VIRGINIA
PORT OF WHEELING } ss: /s/ T. E. TILLIS, U.S.C.G., Officer in Charge, Marine Inspection

Subscribed and sworn to before me this 9th day of April, 1938 by T. E. TILLIS, Officer in Charge, Marine Inspection

/s/
T. E. TILLIS, U.S.C.G.
Authority, 46 U.S.C. 738

[fol. 577]

DEFENDANT'S NO. 2—EXHIBIT 5-A

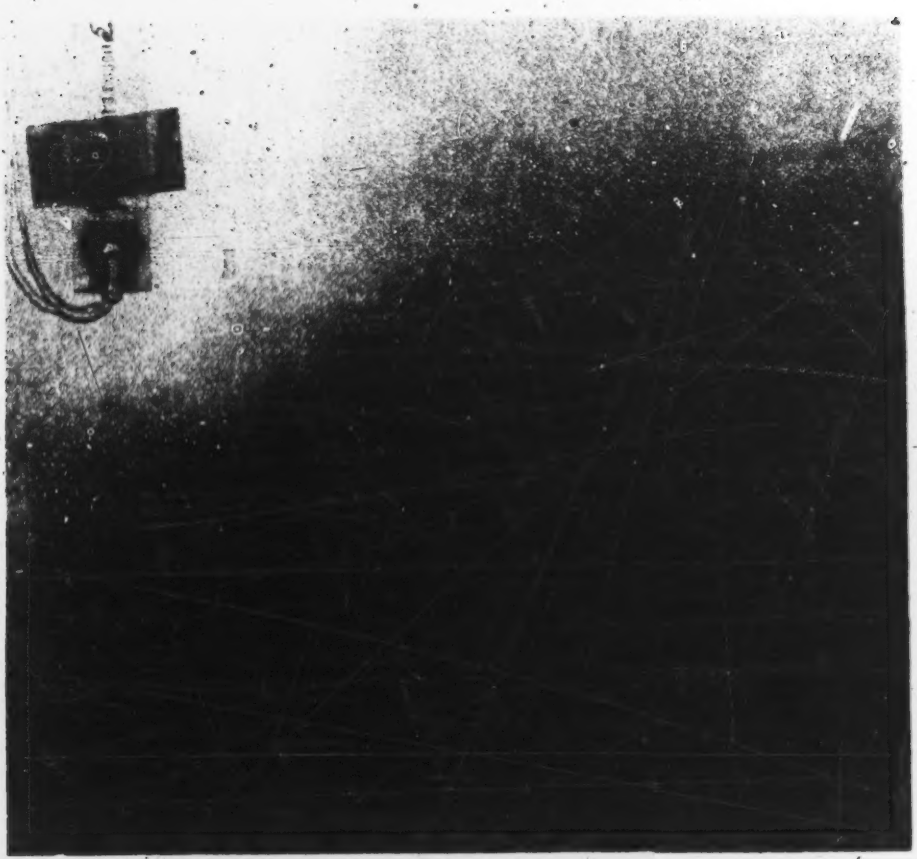
Night. The tow rides down a river engraved in the pilot's mind. The bright pinpoint of a river light, the shadow of a hill barely discernible—these are his landmarks. The rest is memory and knowledge. On the barges the deckhands work in the beam of a searchlight.

[fol. 578]

DEFENDANT'S NO. 2—EXHIBIT 5-B

[fol. 579]

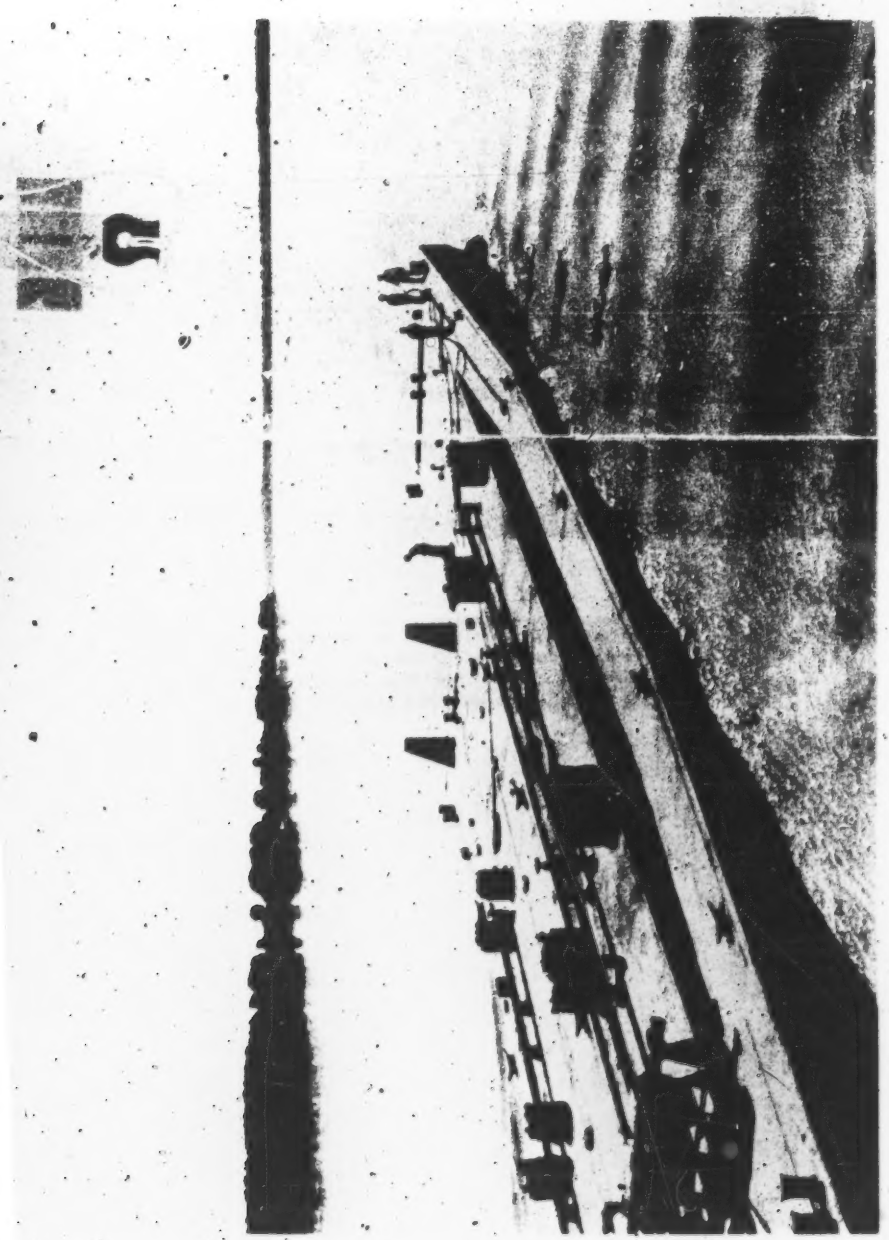
DEFENDANT'S NO. 2—EXHIBIT 5-C



Storm. These three pictures were taken in sequence as a rainstorm enveloped a tow on the Mississippi. Less than five minutes from unlimited visibility to complete blindness.

[fols. 580, 581]

DEFENDANT'S NO. 2—EXHIBIT 5-D



[fol. 582]

On the boats and on the barges the men and women live and work, for months at a time, from port of origin back to port of origin. Ashore people may be having holidays and ball games. For the riverman it's work from the moment he leaves home, work all week and no Sundays.

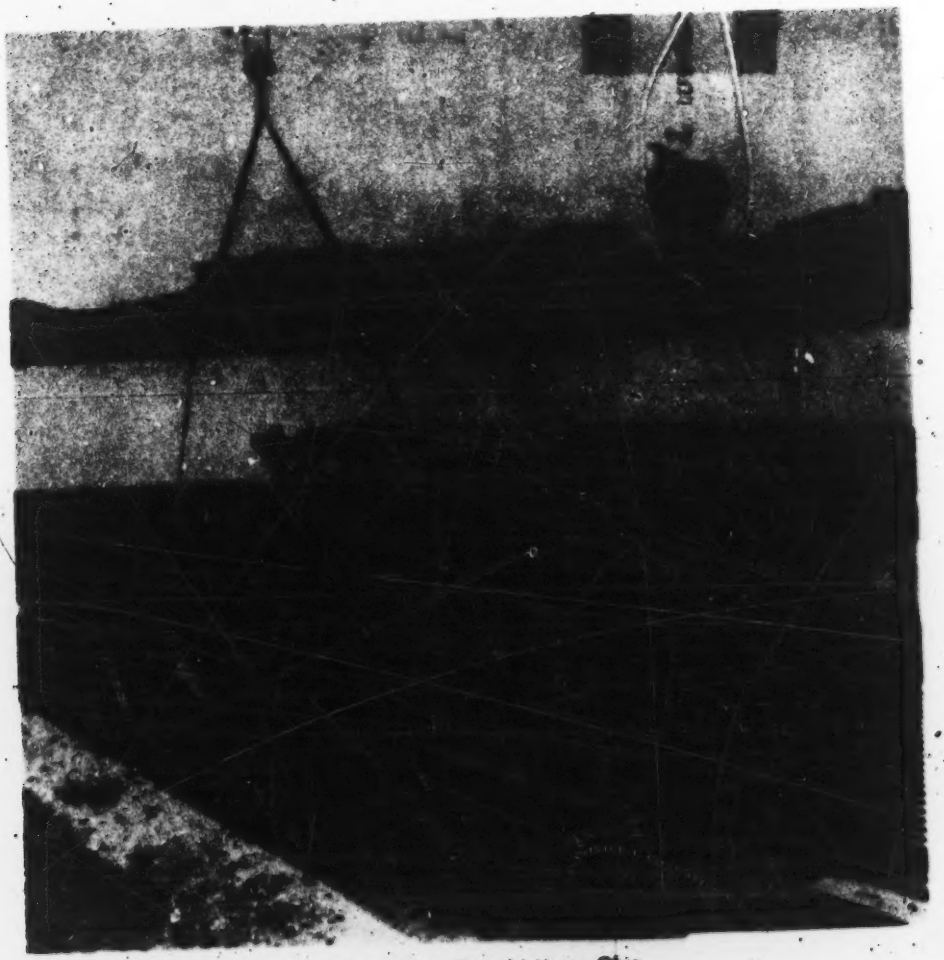
[fol. 583]

DEFENDANT'S NO. 2—EXHIBIT 5-E

The controlled river: A coal tow enters a lock.

[fol. 584]

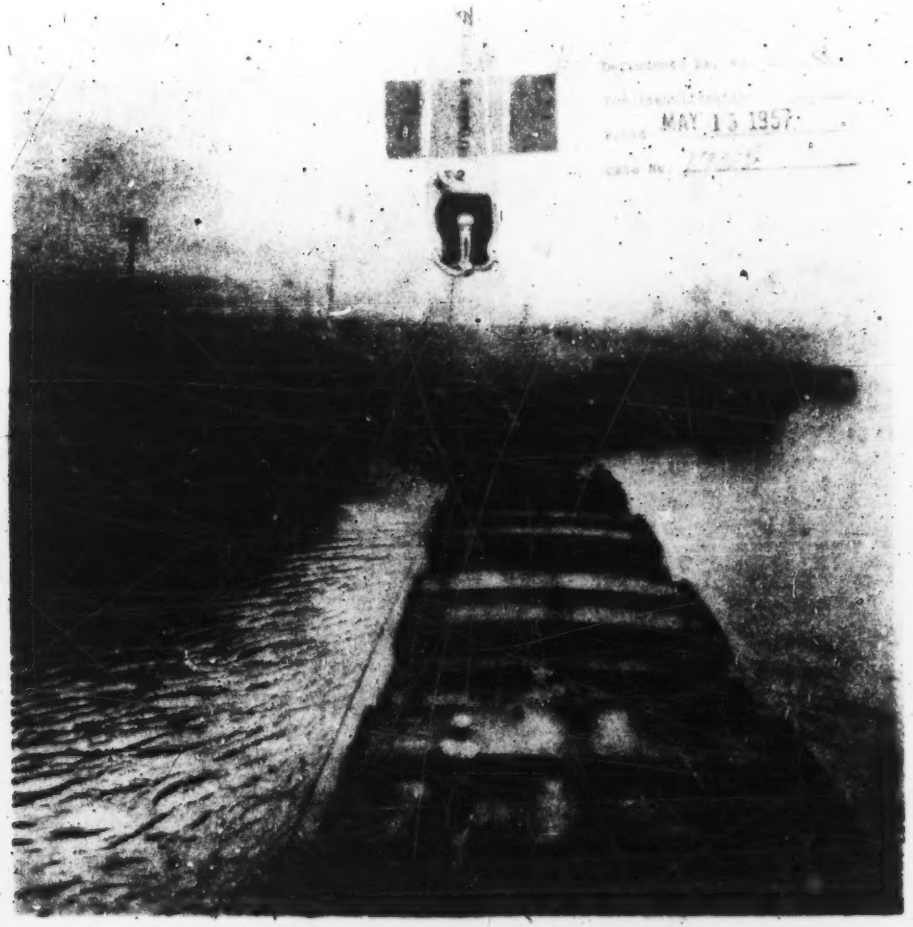
DEFENDANT'S NO. 2—EXHIBIT 5-F



Loading oil-drilling pipe and casing at a steel mill on the Upper Ohio.

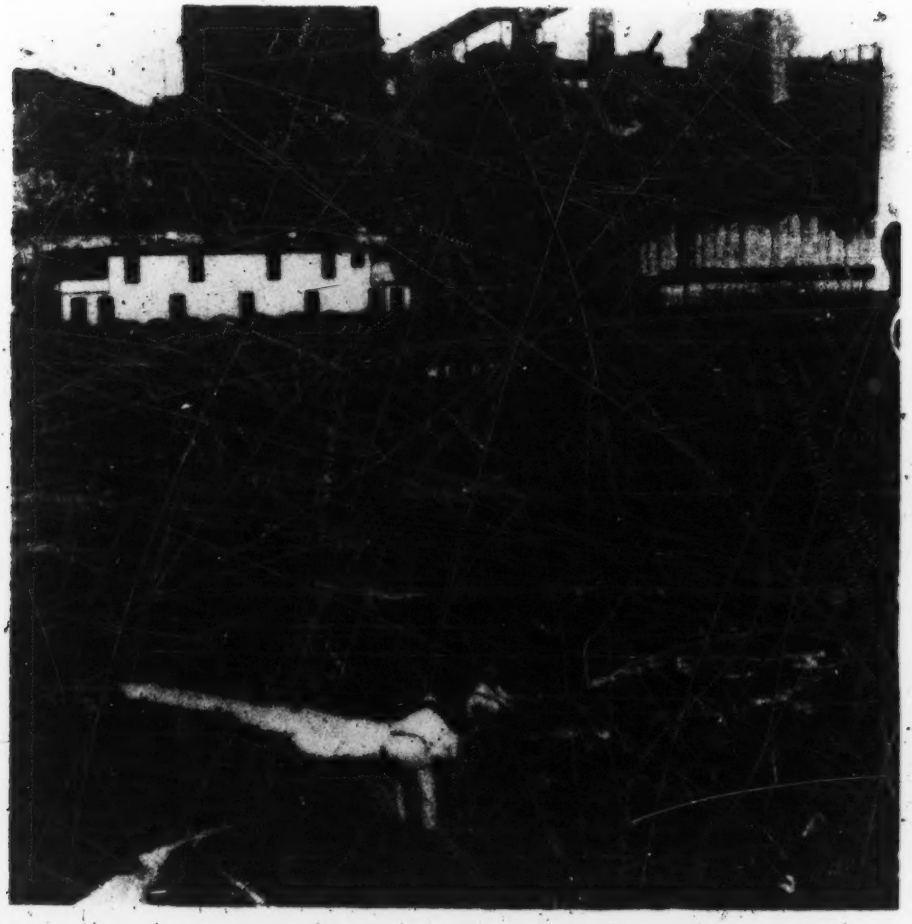
[fol. 585]

DEFENDANT'S NO. 2—EXHIBIT 5-G



[fol. 586]

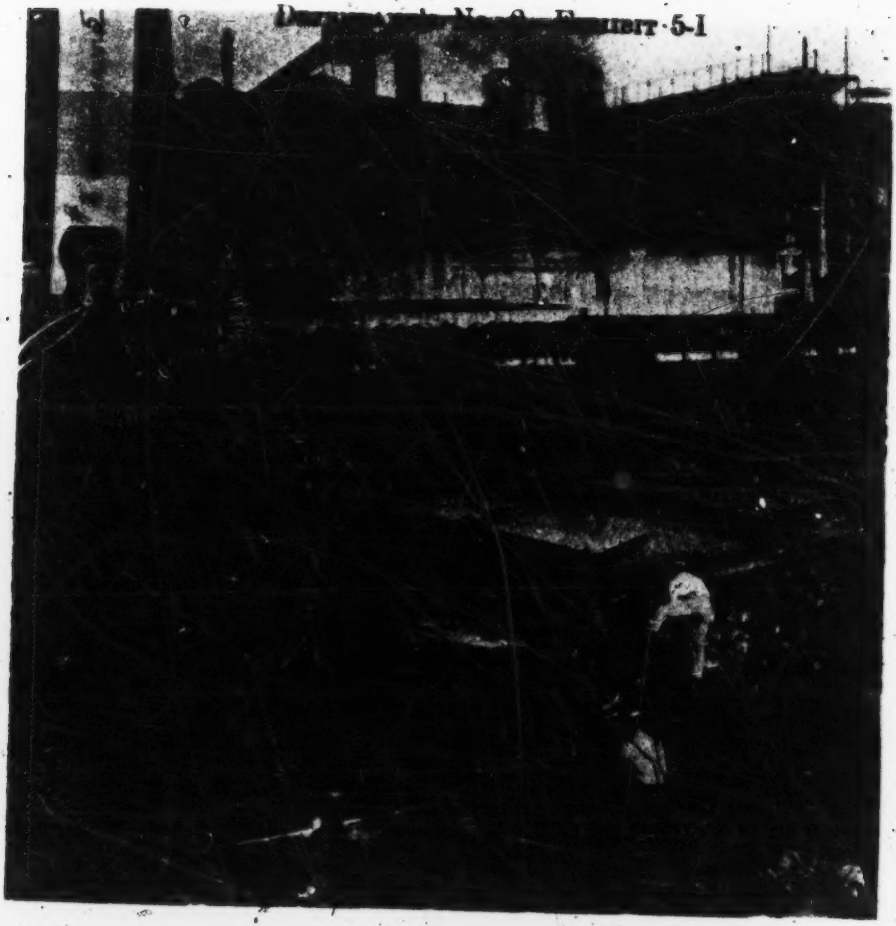
DEFENDANT'S NO. 2—EXHIBIT 5-H



Watch out, she's comin' fast. The deckhand has tossed a line over the timberhead of a barge being picked up at a landing. Make that line fast quick. No time for mistakes. Once you get a barge moving, its great weight is hard to stop for a moment.

[fol. 587]

EXHIBIT 5-I



A few seconds later. The line is taut, the barge at rest. It's still no plaything. In spite of his steamboat figure, the mate scrambles up the side of the barge before it eases fully alongside. That's quite a jump from a loaded oil barge to an empty cargo barge, six feet anyway.

[fols. 588-589]

DEFENDANT'S NO. 2—EXHIBIT 5-J

[fol. 590]

DEFENDANT'S No. 2—EXHIBIT 5-K

Defendants Ex. No. 5-K
For Identification
Filed MAY 15 1957
Case No. 1755

Three tows in a tight place on the Ohio.

[fol. 591]

Defendant's No. 2—Exhibit 5

A close bend on the Big Kanawha.

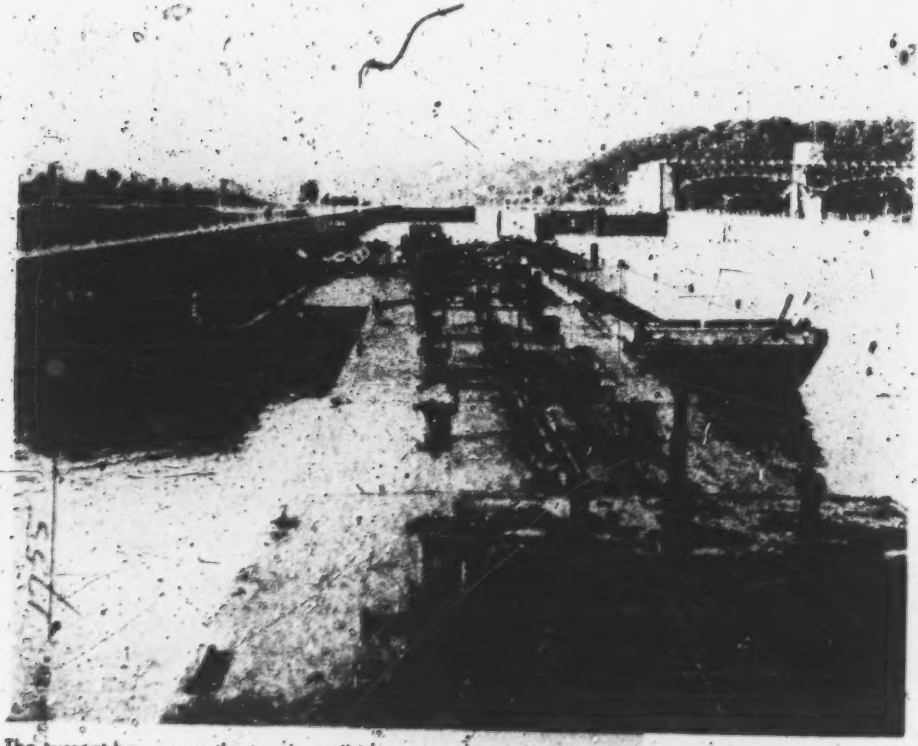
[fol. 592]

DEFENDANT'S NO. 2—EXHIBIT 5-M

Getting in shape for a lock; the tow seems to be heading over the dam.

[fol. 593]

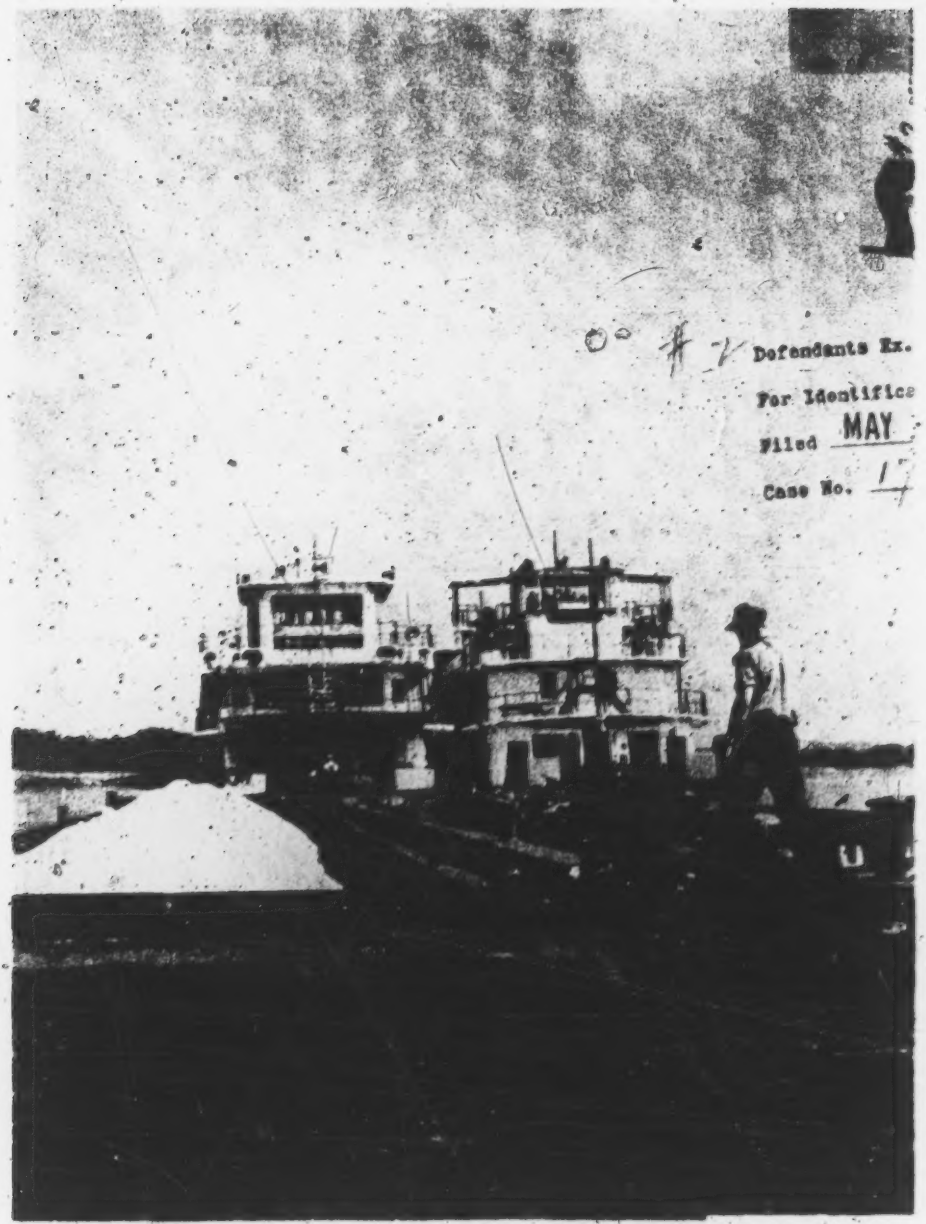
DEFENDANT'S NO. 2—EXHIBIT 5-N



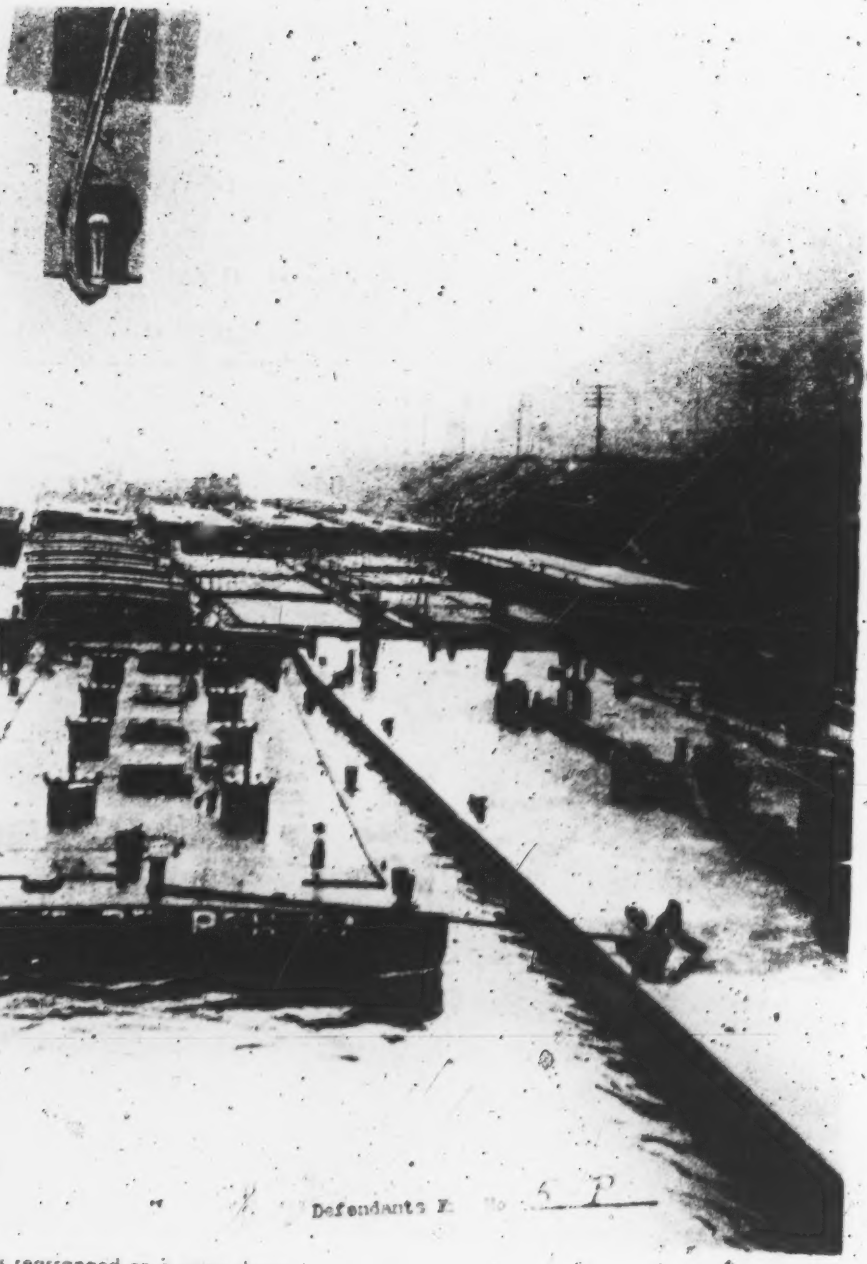
The current has swung the tow in until it rests against the guidewall.

[fol. 594]

DEFENDANT'S NO. 2—EXHIBIT 5-O



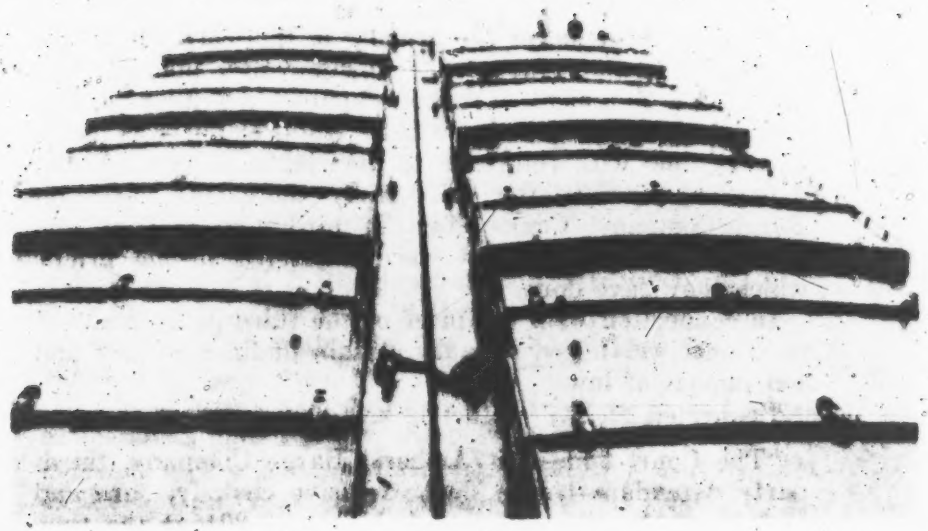
Two boats combine to shove a heavy tow upstream through a bad place.



Defendants E

A tow is rearranged on a rainy down.

Ex. No.
Plaintiff
JUL 15 1957



The white blindness, fog.

[fol. 597] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 24, 1957

June 24, 1957

Bluefield, West Virginia

Harvey Goldstein, Esq.,
Attorney at Law,
220 Broadway,
New York 38, New York

E. Franklin Pauley, Esq.,
Attorney at Law,
Charleston, West Virginia

Charles M. Love, Esq.,
Attorney at Law,
Charleston, West Virginia

William T. O'Farrell, Esq.,
Attorney at Law,
Charleston, West Virginia

In re: Goett, Admx. v. Union Carbide & Carbon Corp., v. Amherst Barge Company, a Corp.
Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights, if any, of that defendant against the third-party defendant, Amherst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested finding of fact is as follows:

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC-204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent [fol. 598] in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence, in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., against defendant Union Carbide & Carbon Corporation.

It is suggested in the brief of the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase such insurance.

An order may be entered in accordance with the views expressed in this letter.

Yours truly,

Ben Moore, United States District Judge.

[fol. 599] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, Deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

JUDGMENT—August 24, 1957.

On the 13th day of May, 1957, came the plaintiff, in the above entitled action, in person and by E. Franklin Pauley, Harvey Goldstein, and S. Eldridge Sampliner, her attorneys, and came the defendant by Charles M. Love, its attorney, and came the third-party defendant by W. T. O'Farrell and D. D. Johnson, its attorneys. Whereupon on motion of plaintiff's attorneys, it was ordered that this action be, and it thereupon was, transferred from the civil side to the admiralty side of this Court; to which said motion and to which order of the Court the defendant and the third-party defendant did object and except.

Thereupon, this action came on regularly for trial before the Court, in Admiralty, without a jury, on said 13th day of May, 1957, at Charleston, West Virginia, and the plaintiff appearing in person and by her attorneys, as aforesaid, and the defendant and third-party defendant appearing by their attorneys, as aforesaid, and testimony having been offered on behalf of all parties and argument made by the respective attorneys for all of said parties.

the Court did, at the conclusion of said trial on the 15th day of May, 1957, make certain findings of fact and conclusions of law which were announced orally by the Court from the bench, as appears from the official transcript of said trial, which said findings of fact and conclusions of law are hereby filed herein by order of the [fol. 600] Court and made a part hereof, and is adopted as the Court's finding of fact and conclusions of law.

The rendition of judgment herein being deferred pending determination by the Court of liability between the defendant and the third-party defendant.

Thereupon the Court did take additional time to consider the matters and things raised herein by and between the said defendant and the said third-party defendant, and after considering the arguments made and the briefs filed by the respective attorneys for said parties with respect thereto, the Court did make certain additional findings of fact and conclusions of law which are set forth in the Court's memorandum opinion in the form of a letter under date of June 24, 1957, which said memorandum opinion is hereby filed herein by order of the Court and made a part hereof, and is adopted as the Court's finding of fact and conclusions of law.

And, on this 24th day of August, 1957, came the plaintiff by E. Franklin Pauley, her attorney, and came the defendant by Charles M. Love, its attorney and came the third-party defendant by David D. Johnson, its attorney; and pursuant to the said findings of fact and conclusions of law made by the Court at the conclusion of the trial herein, and pursuant to said additional findings of fact and conclusions of law embodied in said memorandum opinion of June 24, 1957, it is hereby Ordered and Adjudged:

1. That the plaintiff recover from the defendant, Union Carbide and Carbon Corporation, a corporation, the sum of Twenty Thousand Dollars ($20,000.00), with interest thereon from the 15th day of May, 1957, together with her taxable costs in this behalf expended.

2. That the defendant, Union Carbide and Carbon Corporation, a corporation, take nothing from the third-party defendant, Amherst Barge Company, a corporation, and [fol. 601] that the said third-party defendant recover from Union Carbide and Carbon Corporation, a corporation, its taxable costs in this behalf expended.

To the recovery by the plaintiff herein against the defendant, the defendant and third-party defendant do object and except;

To the limitation of the recovery herein to the sum of Twenty Thousand Dollars ($20,000.00), the plaintiff does object and except; and,

To the refusal of recovery by the defendant against the third-party defendant, the defendant does object and except.

Enter: August 24, 1957.

Ben Moore, United States District Judge.

Inspected by: E. Franklin Pauley, Attorney for Plaintiff; Charles M. Love, Attorney for Defendant; David D. Johnson, Attorney for Third-Party Defendant.

[fol. 602]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7588.

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

versus

ELLEN GOETT, As Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below, Appellee.

Cross-Appeals from the United States District Court for the Southern District of West Virginia, at Charleston.

Argued April 9, 1958.

Before Sobeloff, Chief Judge, Soper, Circuit Judge, and Thomsen, District Judge.

Charles M. Love (Dayton, Campbell & Love, and Charles R. McElwee on brief) for Union Carbide Corporation, [fol. 603] Appellant and Cross-Appellee; Harvey Goldstein (E. Franklin Pauley and S. Eldridge Sampliner on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and David D. Johnson (Jackson, Kelly, Holt & O'Farrell, and W. T. O'Farrell on brief) for Amherst Barge Company, Appellee.

OPINION—Decided May 27, 1958

THOMSEN, District Judge:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union

Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys,[1] and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; [fol. 604] the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

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[1] 14 U.S.C.A. 63; 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was [fol. 605] moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life-jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position

in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superin- [fol. 606] tendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute,[2] alleging that

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[2] W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. * * *"

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

"§ 5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was [fol. 607] negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used, that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work; and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue

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for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * *"

equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

[fol. 608] The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U.S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U.S.C.A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U.S.C.A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242; *Levinson* v. *Deupree*, 345 U.S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman*, 140 W. Va. 357, 84 S.E. 2d 137; *Gulf, C & S. F. T. Co.* v. *McGinnis*, 228 U.S. 173; *Continental Casualty Co.* v. *The Benny Skou*, 4 Cir., 200 F.2d 246, 248, *cert. den.* 345 U.S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must [fol. 609] be taken *cum onere*. *The Harrisburg; Levinson* v. *Deupree; Continental Casualty Co.* v. *The Benny Skou; Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239, 245; *Curtis* v. *A. Garcia y Cia*, 3 Cir., 241 F.2d 30, 35. It has been generally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia; Continental Casualty Co.* v. *The Benny Skou; Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U.S. 606. A cause of

action for damages accrued prior to a decedent's death, whether based on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, at 430, n. 4; *Curtis* v. *A. Garcia y Cia; Holland* v. *Steag, Inc.*, D.Mass., 143 F. Supp. 203; *Meade* v. *Lukseffjell*, S.D.N.Y., 148 F. Supp. 708; Cf. *Cox* v. *Roth*, 348 U.S. 207; *Just* v. *Chambers*, 312 U.S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N.D.W.Va., 131 F. Supp. 754; *Alloy* v. *Hennis Freight Lines*, 139 W. Va. 480, 80 S.E.2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F.2d 711, 714, and *Graham* v. *A. Lusi, Ltd.*, 5 Cir., 206 F.2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 [fol. 610] F.2d 708, and *Skorgaard* v. *The M/V Tungus*, 3 Cir., 252 F.2d 14, noting the strong dissents in both *Halecki* and *Skorgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola*, 189 U.S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 99, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talbot* v. *Hawn*, 346 U.S. 400, 413, because: "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from un-

seaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396, and *Rogers* v. *United States Lines*, 347 U.S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zeeland*, 4 Cir., 240 F.2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chesnut in *Raidy* v. *United States*, [fol. 611] D.Md., 153 F. Supp. 777, aff'd, 4 Cir., 252 F.2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F.2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F.2d 385, *cert. den.* 354 U.S. 938; *West* v. *United States*, E.D.Pa., 143 F. Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F.2d 717. Cf. *Halecki* v. *United New York* and *Skovgaard* v. *The M/V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular opera-

tion, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, [fol. 612] the drydock company. While in extent the work was not as great as in *Berryhill*, *Berge* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F.2d 625, *cert. den.* 352 U.S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F.2d 784, and cases cited. A similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden dan- [fol. 613] ger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used.

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[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F.2d 478, at 479.

It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950.[1] But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States; West* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts*, vol. 2, sec. 21.1.

Judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

[1] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.

[fol. 614]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7588.

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below, Appellee.

Cross-Appeals From the United States District Court for the Southern District of West Virginia.

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

JUDGMENT—Filed and entered May 27, 1958

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinion of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-

[fol. 615] appellant.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Roszel C. Thomsen, United States District Judge.

[fol. 616] June 18, 1958, notice of motion for an order granting rehearing, etc., and affidavit in support of motion, submitted by the Clerk before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7588.

[Title Omitted]

ORDER THAT QUESTIONS BE NOT CERTIFIED TO THE SUPREME COURT AND STAYING MANDATE—Filed and Entered June 18, 1958

On consideration of the Notice of Motion of the appellee and cross-appellant in the above entitled case for an order granting a rehearing, staying the mandate to the Court below, and for a hearing in order to bring to the Court's attention the question of whether certification of questions shall be submitted to the Supreme Court of the United States for determination, and for such further relief as to the Court seems just and proper, and the affidavit of [fol. 617] E. Franklin Pauley, Proctor for the appellee and cross-appellant:

It is ordered by this Court that the questions be not certified to the Supreme Court, and that the mandate of this Court, in this cause be, and the same is hereby, stayed pending application of the appellee and cross-appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for the writ of certiorari is filed in the Supreme Court within the time provided by law.

June 18, 1958.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[fol. 618] Clerk's Certificate foregoing transcript (omitted in printing).

[fol. 619]

SUPREME COURT OF THE UNITED STATES

No. 307, October Term, 1958

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, Deceased, Petitioner,

vs.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY.

ORDER ALLOWING CERTIORARI—March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.